

# EXHIBIT COPY

IN RE: [illegible]

SUPREME COURT OF THE STATE OF [illegible]

COMMONS [illegible]

[illegible]

A. J. [illegible]

R. V. KUMAR [illegible]

GENERAL [illegible]

[illegible]

(80,234)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 924

A. J. BUCK, APPELLANT,

vs.

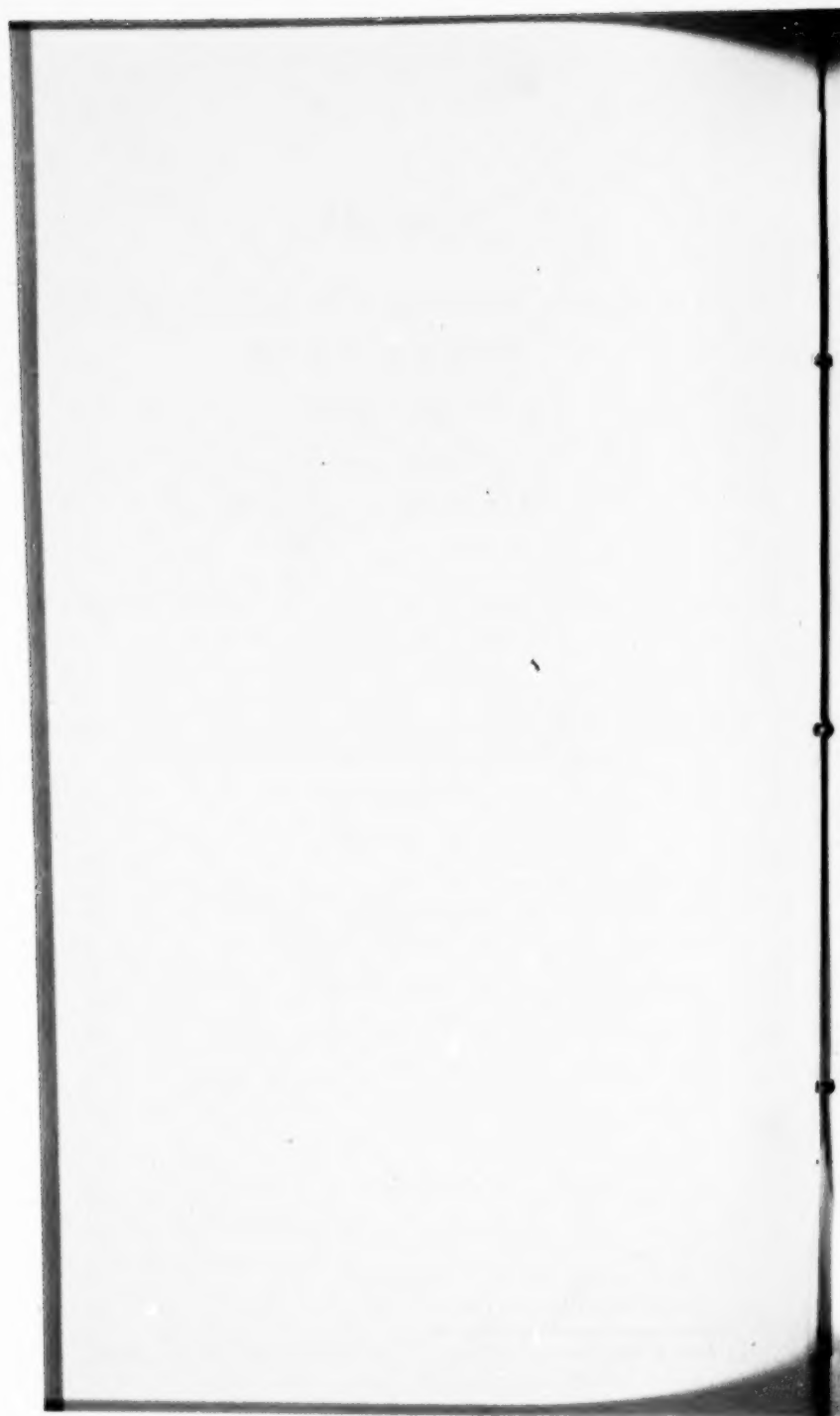
E. V. KUYKENDALL, DIRECTOR OF PUBLIC WORKS OF  
THE STATE OF WASHINGTON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE WESTERN DISTRICT OF WASHINGTON

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[fol. 1]      NAMES AND ADDRESSES OF ATTORNEYS

Crawford, W. R., 325 Lumber Exchange Building, Seattle, Washington, Attorney for Appellant.

Dunbar, John H., Attorney General of the State of Washington, Olympia, Washington; Clifford, Raymond W., Assistant Attorney General of the State of Washington, Olympia, Washington; Brodie, H. C., Assistant Attorney General of the State of Washington, Olympia, Washington, Attorneys for Appellee.

[fol. 2]

IN THE

**DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DISTRICT OF WASHINGTON, SOUTHERN  
DIVISION**

In Equity

No. 189

A. J. BUCK, Plaintiff,

vs.

E. V. KUYKENDALL, director of Public Works of the State of  
Washington, Defendant

AMENDED COMPLAINT—Filed December 22, 1923

To the Honorable Judge of the District Court of the United States  
for the Western District of Washington, sitting in equity:

A. J. Buck files this his amended complaint, by leave of Court first obtained, against E. V. Kuykendall, Director of Public Works of the State of Washington, Defendant; and thereupon complains of the Defendant and shows unto your Honor as follows:

1

That A. J. Buck, plaintiff, is a citizen of the State of Washington, residing at Tacoma.

2

That E. V. Kuykendall, defendant, is now and has been since the spring of the year 1921 the duly appointed, qualified and acting Director of Public Works of the State of Washington, and is a citizen of such State, residing at Olympia.

3

That Congress duly enacted on July 11, 1916, an act entitled:

"An act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes."

That according to the provisions of the said act the Federal Government agreed to furnish moneys to States for the purpose of aiding in the building of Post Roads, provided any State desiring such aid would first pass necessary legislation adopting the provisions of the Federal act. That thereafter the legislature of Washington did duly enact a certain law, entitled:

"An Act relating to public highways, rural post roads, assenting to the provisions of an act of Congress entitled 'An act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes,' approved July 11, 1916; authorizing and directing the highway commissioner, the State highway board and the State treasurer to perform certain duties in connection therewith; providing for the apportionment of certain funds therefor; and declaring an emergency;"

being chapter 76 of the laws of 1917. That such law is herein referred to and made a part hereof the same as if set out in full. Such law went into force and effect immediately upon passage and is now in full force and effect. That by the provisions of said law the State of Washington adopted all the terms and conditions contained in said Federal Act and agreed to abide thereby.

That thereafter Congress duly enacted an Act entitled:

"An Act to amend the act entitled 'An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes,' approved July 11th, 1916, as amended and supplemented, and for other purposes;"

which act was passed November 9, 1921, and is now in full force and effect. That both of said Federal Acts provide that all roads receiving any part of the appropriations provided for should be free of tolls of all kinds. That according to the provisions of said Federal Acts and the State act, full and complete plans for the construction and reconstruction were duly presented by the State and adopted by the Federal Government. That the State highway, commonly known as the Pacific Highway as well as other State roads, were constructed and reconstructed by such Federal aid, for the purpose of having a complete and improved Public Highway, extending from British Columbia to Mexico in order to furnish means of communication in Interstate Commerce, being also International in character. That said "Pacific Highway" has been constructed and reconstructed from the said British Columbia through the States of Washington and Oregon and is open for and being used by traffic. That the Federal Government has paid over to the State of Washington and the said State has received the same large sums of money which has been expended under the provisions of said Federal Act upon said "Pacific Highway" as well as on other rural post roads in said State. That the plaintiff has been informed, believes and so charges

the fact to be, that not less than one quarter of the entire cost of the construction and reconstruction of the said "Pacific Highway" located between Seattle and Vancouver, Wash. was borne by the Federal Government. That the distance by said highway between said Seattle and Vancouver, Wash. approximately 194 miles.

That all of said portions of said "Pacific Highway", as aforesaid, being constructed and reconstructed as aforesaid are now used for traffic and this plaintiff is entitled to and claims the right, under said Federal Acts and State act to operate his motor propelled vehicles over such portions of said highway as well as other rural post roads as thoro-fares, subject however to proper regulations in such operations. That under the same provisions of the same Federal Acts, the State of Oregon, having adopted such acts by its legislature, has also recieved and expended a large percentage of the entire cost of construction and reconstruction of the said "Pacific Highway" from the Oregon line at Vancouver, Washington, to Portland, Ore-[fol. 5] gon. That the Washington legislature duly enacted a law entitled;

"An Act relating to the use of the Public Highways and the rights and remedies of persons thereon, providing for the licensing of motor vehicles and collecting, distribution and expenditure of fees therefore, fixing penalties for violations thereof, and repealing chapter 153 of the laws of 1913 and chapter 142 of the laws of 1915;"

Being chapter 96 of the session laws of 1921, and thereafter amended some of the sections thereof by a law duly enacted, entitled:

"An act relating to the use of the Public Highways and the rights and remedies of persons thereon, and amending sections 6313, 6328, 6330, 6332, 6335, 6339, 6340, 6355 and 6358 of Remington's Compiled Statutes, adding thereto a new section to be known as section 6358-1 and declaring that this act shall take effect immediately;"

Being chapter 181 of the laws of 1923. Such law, as amended, is now in full force and effect. That such law, as amended provides the entire rules and regulations for the government of traffic on the Public Highways of the State; also fixes the fees to be paid and in section 7 thereof authorizes the issue of said Public highways to all motor vehicles duly licensed under the provisions of said law; and further penalties for failure to obey any and every provision of said law, as amended, for any violation thereof. That such law, as amended, is hereby referred to and made a part hereof as if set out in full. That this plaintiff has complied with each and every provision of said law, as amended and is ready, willing and able at all times hereafter to comply therewith.

That the Washington legislature duly enacted a law entitled:

[fol. 6] "An act relating to the operation of vehicles and the use of Public Highways, providing for the licensing of persons operating

motor vehicles, providing for the enforcement thereof and all other highway and motor vehicle laws and prescribing penalties for violations thereof; and making appropriations;"

being chapter 108 of the session laws of 1921, which law was thereafter amended in part by *by* a law duly enacted, entitled:

"An act relating to the operation of vehicles and the use of Public highways, providing for the licensing of persons operating motor vehicles, providing for the enforcement thereof and all other highway and motor vehicle laws and prescribing penalties for violation thereof; and amending Section 234-22 of Pierce's Code, and adding a new section;"

being chapter 122 of the session laws of 1923. Such law, as amended, provides for each operator of a motor vehicle to procure a license to drive the same, paying a fee therefor. That this plaintiff and his drivers have complied with all the provisions of said law as amended and are ready, willing and able at all times to comply therewith. That such law as amended is hereby referred to and made a part hereof as if set out in full.

That the above laws, as amended, to-wit, chapter 96 of the Session laws of 1921 and chapter 108 of the Session laws of 1921, are the only laws now in full effect and force enacted by the State of Washington relating to the operation of motor propelled vehicles on the Public Highways of said State, except the law hereafter referred to, being chapter 111 of the Session laws of 1921, as amended.

## 6

That the State of Washington duly enacted a law, entitled:

"An act providing for the additional supervision and regulation of the transportation of persons, and property for compensation over any Public highway by motor propelled vehicles: Defining transportation companies and providing for additional supervision and regulation thereof by the Public Service Commission, providing for the enforcement of the provisions of this act and for the punishment of the violations thereof;"

being chapter 111 of the Session laws of 1921, and thereafter Section 9 of the said law was duly amended by a law, entitled:

"An Act to relieve the general fund of the expense of regulating and supervising auto transportation companies, creating a fund and providing fees to cover the cost of such regulation, and amending Section 9 of chapter 111 of the laws of 1921, and making an appropriation;"

being chapter 79 of the Session laws of 1923. That said law went into full force and effect in June, 1921, and as now amended is in full force and effect. Such law, as amended, is hereby referred to and made a part hereof as if set out in full. That by the provisions of

said law, as amended, the Defendant, as Director of Public Works, is vested with sole and exclusive authority, and it is made his duty, to enforce the provisions of said law, as amended, and to order the institution of actions, both civil and criminal, against persons or corporations for any alleged violations thereof. Further said defendant is vested with sole authority to grant or refuse to any person or corporation to operate on the Public highways of the State who come within the definition of auto transportation companies as set out in said law. Such law also provides that no license can be granted by said defendant to operate in the same territory occupied by another certificate holder unless the latter fails, refuses or declines to obey the proper orders of said defendant, and then only after a proper hearing. Such law, as amended, vests said defendant with the sole jurisdiction and authority to control, supervise and regulate said auto transportation companies in all matters, including making, altering or changing the rates of fare or time schedules. Such law, as [fol. 8] amended, also provides that surety Bonds or liability insurance must be carried on each motor vehicle operated, the premium for each policy vary from \$200.00 a year to over \$400.00 a year, depending on the carrying capacity of the vehicle bonded or insured. That said law, as amended, provides that a violation of any provision thereof or the failure to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement made by the department shall constitute a gross misdemeanor and punished as such, being either a fine or imprisonment or both.

## 7

That under the provisions of said law, chapter 111 of the session laws of 1921, as amended, the defendant has granted and has issued to the Park Auto Transportation Company a certificate to operate between the Cities of Seattle and Tacoma, on the said "Pacific Highway," and the said grantee is now operating between said two Cities and is carrying passengers between said two Cities and intermediate points; that another certificate under said law has been issued to the Thompson-Smith Company to operate between the Cities of Tacoma and Olympia, on said "Pacific Highway," carrying passengers between said points and intermediate points; a certificate also has been granted under said law to the Northwestern Transportation Company to operate between the Cities of Olympia and Kelso, on the said "Pacific Highway," carrying passengers between said points and intermediate points; and further; a certificate has been issued under the said law to the Camas Stage Company, a Washington Corporation, to operate between Kelso, Washington, and Portland, Oregon, over the said "Pacific Highway," carrying passengers between said points and intermediate points.

[fol. 9] That each one of said companies so operating as above stated has no authority to operate except between said points on said highway as named in its certificate. That the said defendant, although petitioned so to do, has never issued and has refused to issue any certificate under the provisions of said law of 1921, as amended, to any person or corporation for the purpose of carrying

through passengers on said "Pacific Highway" between Seattle or Tacoma and the boundary line of the State of Washington and Oregon, and that there is not now any certificate holder entitled to operate a through service on said "Pacific Highway" from Seattle or Tacoma either to the southern boundary line of the State of Washington or to Portland, Oregon. That there is not now any through line whatever operated between said Cities of Seattle or Tacoma, Washington, and Portland, Oregon, carrying through passengers by motor vehicles stages between said points on said "Pacific Highway" or any other highway. Further, that said above companies by virtue of the certificates granted to them under the provisions of said law are using said parts of said "Pacific Highway" as places of business, taking on and discharging passengers along said highway. Further that certificate holders are operating as set out above motor busses which carry from 25 to 30 passengers each and stop on and along said highway to take on and discharge passengers, using said highway for doing business and not as a thoroughfare. That the plaintiff does not intend to and will not operate any motor vehicle of larger carrying capacity, wider or heavier than the motor vehicles operated by said certificate holders which have been authorized to be used by the said defendant. That that said Public Highways, including the "Pacific Highway" are not being obstructed or interfered with nor is [fol. 10] the traveling public thereon inconvenienced by the said operation of said certificate holders, doing entirely a local business between their termini as aforesaid. That plaintiff in his operation does not intend to and will not stop on or along said public highways to take on or discharge passengers and will not cause any hindrance to traffic on said highway or inconvenience to the traveling public thereon.

## 8

That this plaintiff has been engaged for many years last past in the business of transporting passengers by motor stage in the State of Washington and after a careful examination has found, after interviewing more than a thousand people in the Cities of Seattle and Tacoma, Washington and adjacent territory, and Portland, Oregon, that there is a demand for a through stage line to carry persons between Seattle and Tacoma, Washington and Portland, Oregon. That such a line had been in operation prior to December 1922 for many months running a daily schedule, which line was compelled to stop operation in December 1922 on account of the threats of the defendant herein to cause the arrest of the officers, agents and drivers of said line claiming it was illegally operating such interstate business not having received a certificate under the provisions of chapter 111 of the session laws of 1921 and for no other reason whatsoever. That during the operation of said stage line for a period of 9 months it had been financially successful charging \$5.50, between Seattle and Portland and \$4.50 between Tacoma and Portland. That since the discontinuance of said line as aforesaid there has not been and there is not now any through stage line operated between the said Cities of Seattle, Washington, and Portland, Oregon, as aforesaid.



[fol. 11] That the plaintiff herein is the grantee and owner of a certificate issued by the State of Oregon authorizing him to operate motor propelled vehicles carrying passengers on the "Pacific Highway" between the City of Portland, Oregon, and the northern boundary line of the State of Oregon, at Vancouver, Washington as a continuous stage line between the Cities of Portland, Oregon, and Tacoma and Seattle, Washington. That the plaintiff is obliged to, by the terms and conditions of said certificate, operate said line on or before November 12, 1923, or the said certificate will be revoked and cancelled. That the plaintiff has complied with all the laws of Oregon in respect to said certificate, including the payment of the necessary fees therefor. The said certificate was so granted by the railroad Commission of the said State of Oregon under the provisions of the law of Oregon duly enacted;

"An act providing for the supervision and regulation of the transportation of persons and property for compensation over any Public Highway by motor vehicles, motor trucks, motor busses, bus trailers, semi-trailers and other motor trailers used in connection therewith, and by other motor vehicles; defining what constitutes transportation for compensation, defining transportation companies, and providing for the supervision and regulation thereof by the Public Service Commission of Oregon; providing for the enforcement of the provisions of this act and for the punishment for violations thereof, and declaring an emergency;"

being chapter 10 of the Special Session Laws of 1921, as amended by chapter 205, General Laws of Oregon of 1923; that such law, as amended, is now in full force and effect. Such law is hereby referred to and made a part hereof as if the same was set out in full. That the plaintiff has duly filed his time schedule and tariff with said commission. That the rate of fare so provided for is \$5.60 between Portland and Seattle and \$4.60 between Portland and [fol. 12] Tacoma. That the present time table provides for tri-weekly trips both ways between said Cities of Portland and Seattle with the right under the said law of Oregon to increase such schedule whenever the plaintiff may desire.

That the plaintiff, being desirous of engaging in interstate commerce by transporting persons for compensation between the Cities of Seattle and Tacoma, Washington, and Portland Oregon, and not doing any Intrastate business whatever and in order to carry on such business subject to all laws, rules and regulations of the State of Washington, did duly apply to the defendant herein for a certificate under the provisions of chapter 111 of the laws of 1921. That such application, sworn to by the plaintiff, was prepared on the form furnished by the defendant. That such printed form contained the following, being clause 13 thereof and reading as follows:

"Applicant is familiar with the provisions of chapters 96, 108 and 111, Session laws of 1921, and the Rules and Regulations of the Department of Public Works of Washington, governing the equipment and operation of motor vehicles upon the highways of the State of Washington and promises prompt compliance therewith."

That the plaintiff had complied and has complied with all of the laws, rules and regulations of the Department of Public Works in connection with the said application. That the said law chapter 111 and the rules and regulations of the said Department of Public Works required the plaintiff to do or perform no other thing in connection with the said application than he had done and performed. Further, the plaintiff on oath had promised prompt compliance with the provisions of chapters 96, 108 and 111, of the session laws of 1921, governing the equipment and operation of motor vehicles upon the Public Highways of the State. That the [fol. 13] plaintiff had and has complied in all respects with the provisions of Chapter 96, of the Session laws of 1921, as amended, and Chapter 108, of the Session laws of 1921, as amended, as hereinbefore alleged. That the said defendant herein in June 1923, entered an order on said application denying a certificate or license to said plaintiff to engage in said interstate commerce solely upon the grounds that the local service furnished by the said 4 certificate holders and the train service furnished adequate transportation between Seattle and Tacoma, Washington and Portland, Oregon; and that plaintiff if granted a certificate did not show sufficient financial ability to purchase or a-quire motor vehicles to operate such interstate commerce. That plaintiff was and is now financially able to a-quire motor vehicles sufficient in number to operate such interstate commerce and is financially able to do such business.

That by reason of the said action of the said defendant, this plaintiff has not been and will not be able to comply with any other provision of Chapter 111, as amended, as defendant herein has refused to and will continue to refuse to permit the plaintiff so to do and said denial of said certificate was not based upon the refusal of plaintiff to comply with any provision of the laws or rules and regulations of the department as plaintiff had complied as far as he has been permitted so to do by said defendant with all laws, rules and regulations. Further, this plaintiff is ready, willing and able and agrees to and will conform to and comply with all of the provisions of Chapter 111, as amended, and the rules and regulations of the Department of Public Works of the State of Washington, regulating the equipment and the operations of motor vehicles on the Public Highways as specifically set forth in the said clause of the said application as herein above set forth.

[fol. 14]

11

The plaintiff says further that if he undertakes to operate under the said certificate granted him by the State of Oregon and as required so to do on or before November 12, 1923, or forfeit the same

and lose the monies paid into the State of Oregon therefor and continues such operation on the said "Pacific Highway" into the State of Washington and deliver passengers taken on at Portland, Oregon, to Tacoma and Seattle, Washington, the defendant will immediately cause the arrest of this plaintiff and his servants, agents, employees and drivers and will cause such arrests to be made on every trip attempted to be made between said Cities of Portland, Oregon, and Tacoma and Seattle, Washington, upon the sole grounds that the plaintiff is operating such interstate commerce business without having been granted a certificate as aforesaid under Section 4 of Chapter 111, of the session laws of 1921, as amended.

## 12

The plaintiff says further, that the railroad fare between the Cities of Seattle, Washington and Portland, Oregon, is \$6.58, and the fare by the said local stages between the said points is \$6.85; the railroad fare between Tacoma, Washington and Portland, Oregon, is \$5.21, and the fare by said stages between said points is \$5.85, that the fare filed by plaintiff as hereinbefore set out saves the traveling public large sums of money, all of which reduces the cost on interstate commerce.

That the said action of the said Director in refusing to permit the operation in said interstate commerce directly burdens said commerce as the same is prohibited and the traveling public suffers thereby.

The plaintiff says further, that the provisions of said law, Chapter [fol. 15] 111, of the Session laws of 1921, compelling the plaintiff to obtain a certificate or license to engage in interstate commerce and vesting sole jurisdiction or authority in the Director of Public Works to grant or refuse such certificate, but restricting one certificate holder in the same territory, as well as the acts of the defendant in denying the certificate or license to operate motor propelled vehicles, engaged wholly in interstate commerce, between Seattle, Washington and the southern boundary line of Washington at Vancouver, over and along the same Public Highways, which have received Federal aid as are now operated over by 4 certificate holders restricted to intrastate commerce, and to be regulated by the same laws, rules and regulations as regulate the said 4 certificate holders, take plaintiff's property without due process of law, destroy his privileges and immunities to engage in interstate commerce, not only in the State of Washington but also in the State of Oregon, have created a monopoly on Federal Aided Interstate Public Highways, have violated the contract made by the State under the provisions of which it has received Federal aid, discriminate against interstate commerce on such Public Highways in favor of Intrastate commerce, and prohibit interstate commerce to be carried on under the same laws, rules and regulations of the State of Washington as are applied to and under which intrastate business is now carried on on said Public Highways, all of which are contrary to and in

contravention of the constitution of the United States, especially the 14th Amendment thereof and article 1, section 8 thereof, the protection of which Constitution the plaintiff prays.

## 14

That unless this plaintiff is given protection by injunction, he, his servants, agents, employees and drivers will be arrested daily in various Counties along said "Pacific Highway" and will at large expense be compelled to defend numerous suits and actions and numerous fines and imprisonment will be imposed upon him, his servants, agents, employees and drivers, and he will not be able to engage in said interstate commerce and will forfeit his rights to operate under and by virtue of the certificate issued to him by the State of Oregon, and further the Public will not be able to enjoy the decreased rate between Seattle and Tacoma, Washington and Portland, Oregon, and said through interstate service by motor vehicles and thereby this plaintiff, as well as the Public, will sustain large, heavy and irreparable loss, damage and injury, and the plaintiff has no plain, speedy and adequate remedy at law.

## 15

That the matters involved in this controversy exceed in value the sum of \$3,000.00, exclusive of interest and costs.

## 16

For as much as the plaintiff can have no adequate relief except in this Court, and to the end, therefore, that the defendant may, if he can, show why the plaintiff should not have the relief herein prayed, and make full disclosure and discovery of all the matters aforesaid, according to the best and utmost of his knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters in this amended bill of complaint hereinbefore stated but not under oath, and answer under oath being expressly waived, the plaintiff prays that a temporary injunction be granted, restraining the defendant and all other officers and agents of the State of Washington from arresting or threatening to arrest or otherwise preventing, hindering or obstructing the plaintiff, his servants, agents, employees or drivers while engaged in operating motor [fol. 17] propelled vehicles carrying passengers and their personal baggage for compensation over the Public Highways of the State of Washington, between the City of Seattle, and the Southern Boundary line of the State of Washington, at Vancouver, Washington, and intermediate points, no passenger taken on in the State of Washington to be discharged within such State, all business transacted to be restricted to interstate commerce, upon the ground and for the reason that the plaintiff has not obtained the certificate as provided for in said law Chapter 111, as amended, and said injunction order not to protect the said plaintiff, agents, servants, employees and

drivers against the violation of the provisions of other laws of said State relating to and regulating motor propelled vehicles and their owners or operators nor any of the provisions of said law Chapter 111, as amended, except the said provisions regarding obtaining a certificate to operate the business of auto transportation; that as the constitutionality of a State Statute and the enforcement thereof by the defendant, the officer vested with proper authority, is sought to be enjoined, the plaintiff prays that the Court proceed to call in two other Judges of this Court, one of whom to be a Circuit Judge, for the purpose of hearing and determining the application for the temporary injunction as prayed for herein, and that pending the hearing and determination of said application for such temporary injunction, the Court will issue a temporary restraining order, restraining the defendant and all other officers and agents of the State of Washington from arresting or threatening the arrest or otherwise preventing, hindering or obstructing the plaintiff, his servants, agents, employees or drivers while engaged in operating motor propelled vehicles carrying passengers and their personal baggage for compensation over the Public Highways of the State of Washington between the City of Seattle and the southern boundary [fol. 18] line of the State of Washington, at Vancouver, Washington, and intermediate points, no passenger taken on in the State of Washington to be discharged within such State, all business transacted to be restricted to interstate commerce, upon the ground and for the reason that the plaintiff has not obtained the certificate as provided for in said law Chapter 111, as amended, and said injunction order not to protect the said plaintiff, agents, servants, employees and drivers against the violation of the provisions of other laws of said State relating to and regulating motor propelled vehicles and their owners or operators nor any of the provisions of said law Chapter 111, as amended, except the said provisions regarding obtaining a certificate to operate the bus of auto transportation; and that upon the final hearing of this suit, the provisions of said law, Chapter 111, of the Session laws of 1921, as amended, relating to and compelling the obtain- of a certificate in order to operate motor propelled vehicles engaged in interstate commerce be declared void and unconstitutional and that such temporary injunction be made permanent, and plaintiff prays for such other, further and proper relief as may be just and equitable in the premises.

W. R. Crawford, Solicitor for Plaintiff.

[fol. 19] Jurat showing the foregoing was duly sworn to by A. J. Buck omitted in printing.

[File endorsement omitted.]

[fol. 20]

## IN UNITED STATES DISTRICT COURT

[Title omitted]

## MOTION TO DISMISS—Filed January 15, 1924

Comes now the defendant and moves the Court to dismiss the amended bill of complaint filed herein, for the reason and upon the ground that, as appears upon the face thereof,

## I

Said amended bill of complaint does not state any matters of equity entitling the plaintiff to the relief prayed for.

## II

Said amended bill of complaint does not state facts sufficient to entitle plaintiff any relief against this defendant.

## III

Wherefore, defendant prays the judgment of this Court whether he shall further answer, and that he be dismissed with his costs.

John H. Dunbar, Attorney General; Raymond W. Clifford, Assistant Attorney General; E. W. Anderson, Assistant Attorney General, Solicitors for Defendant.

[File endorsement omitted.]

[fol. 21]

## IN UNITED STATES DISTRICT COURT

[Title omitted]

## ORDER SUSTAINING MOTION TO DISMISS AMENDED BILL OF COMPLAINT—Filed January 28, 1924

This cause coming on regularly to be heard on the 21st day of January, 1924, upon the defendant's motion to dismiss the amended bill of complaint filed herein, plaintiff being represented by W. R. Crawford, his counsel, and defendant being represented by John H. Dunbar, attorney general; Raymond W. Clifford, assistant attorney general, E. W. Anderson, assistant attorney general, and H. C. Brodie, of counsel, and the Court being fully advised in the premises, it is hereby

Ordered, adjudged and decreed that the said motion be and it is hereby granted and that said amended bill of complaint be and the same is hereby dismissed.

To the foregoing the plaintiff excepts and his exception is allowed.  
 Done in open Court this 28th day of January, 1924, as of the  
 21st day of Jan., 1924.

Jeremiah Neterer, Judge.

O. K. as to form. W. R. Crawford, Counsel for Plaintiff.

[File endorsement omitted.]

[fol. 22] IN UNITED STATES DISTRICT COURT

ORDER DISMISSING COMPLAINT—Filed January 21, 1924

This cause coming on to be heard on the motion of E. V. Kuykendall, Director of Public Works of the State of Washington, Defendant, to dismiss said cause for want of equity and because the said complaint does not state a good cause of action, and after plaintiff had announced in open Court that he would stand on said complaint and the Court having heard arguments of counsel and being fully advised in the premises,

It is ordered, adjudged and decreed that the said above-entitled cause be and the same is hereby dismissed.

To all of which the plaintiff excepts and such exceptions are hereby allowed.

Enter:

Jeremiah Neterer, Judge.

[File endorsement omitted.]

[fol. 23] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FIXING APPEAL BOND—Filed January 21, 1924

This cause coming on to be heard upon the application of A. J. Buck, plaintiff in the above-entitled cause, for the fixing of the amount of bond on appeal to the Supreme Court of the United States and the plaintiff having given notice of appeal in open Court and the Court having heard the suggestions of the respective counsel of the parties hereto and being fully advised in the premises,

It is ordered, adjudged and decreed that the amount of such appeal bond be and it is hereby fixed at (\$500.00) Five Hundred Dollars, and further,

It is ordered, adjudged and decreed that said appeal prayed for by the plaintiff be and is hereby allowed upon the filing of a proper bond conditioned as provided for by law in the said sum of Five Hundred Dollars (\$500.00) and approved by the Court.

Enter:

Jeremiah Neterer, Judge.

[File endorsement omitted.]



[fol. 24]

## IN UNITED STATES DISTRICT COURT

[Title omitted]

## ASSIGNMENT OF ERRORS—Filed February 20, 1924

And now, on this 20th day of February A. D. 1924, came the plaintiff by his solicitor, W. R. Crawford, and says that the decree entered in the above cause on the 21st day of January A. D. 1924 is erroneous and unjust to plaintiff.

First. Because the Court erred in dismissing the amended bill of complaint.

Second. Because the Court erred in dismissing the cause upon refusal of the plaintiff to further plead after the amended complaint had been dismissed.

Wherefore the plaintiff prays that the said decree be reversed and the District Court be instructed to enter such decree as prayed for by said bill of complaint or for such relief as the plaintiff is entitled to and as the nature of the cause demands.

W. R. Crawford, Solicitor for Plaintiff.

[File endorsement omitted.]

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[fol. 25] APPEAL BOND FOR \$500—Approved and filed February 23, 1924; omitted in printing

[fol. 26] [File endorsement omitted.]

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[fol. 27]

[Title omitted]

## NOTICE—Filed February 23, 1924

To John H. Dunbar, attorney general; Raymond W. Clifford, assistant attorney general; E. W. Anderson, assistant attorney general, solicitors for appellee:

Please take notice that on the 23 day of February the undersigned filed with the Clerk of this Court a Præcipe for the record to be transmitted to the Supreme Court of the United States on the appeal taken in the above cause, a copy of which Præcipe is herewith served on you.

Dated this 23 day of February, 1924.

W. R. Crawford, Solicitor for Appellant.

Service of the within notice and copy of Præcipe is hereby accepted this 23 day of February, 1924.

John H. Dunbar, Attorney General; Raymond W. Clifford, Assistant Attorney General; H. C. Brodie, Assistant Attorney General, Solicitors for Appellee.

[fol. 28] [File endorsement omitted.]

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[fol. 29] IN UNITED STATES DISTRICT COURT

PRÆCIPE—Filed February 23, 1924

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above-entitled case for the use of the Supreme Court of the United States by including the following:

1. The amended bill of complaint.
2. The motion to dismiss the amended complaint.
3. Order dismissing the amended complaint.
4. Order dismissing cause, on refusal to plead further.
5. Order granting appeal and fixing amount of appeal bond.
6. Assignment of errors.
7. Appeal bond.
8. Præcipe.
- 8½. Notice of filing of Præcipe.
9. Certificate of Clerk.

N. B.—Omit all captions on instruments, pleadings and orders.

Dated this 23rd day of February, 1924.

W. R. Crawford, Solicitor for Appellant.

[File endorsement omitted.]

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[fol. 30] IN UNITED STATES DISTRICT COURT

APPELLEE'S PRÆCIPE FOR ADDITIONAL RECORD—Filed March 1, 1924

To the clerk of the above-entitled court:

Please make and certify on appeal to the Supreme Court of the United States, the following additional portions of the record which appellee requests to be printed, to-wit:

1. Original bill of complaint.
2. Decision of the three judges filed December 7, 1923, denying interlocutory injunction.
3. Motion to dismiss for lack of jurisdiction by reason of non-joinder of indispensable and necessary parties.
4. Decision of three-judge court filed January 7, 1924, denying interlocutory injunction on amended complaint.
5. Order denying motion to dismiss on account of want of jurisdiction.
6. This praece with affidavit of service thereof.

Dated this 29th day of February, 1924.

John H. Dunbar, Attorney General; Raymond W. Clifford, Assistant Attorney General; H. C. Brodie, Assistant Attorney General, Solicitors for Appellee.

[fol. 31] Affidavit of service omitted.

[File endorsement omitted.]

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[fol. 32] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DISTRICT OF WASHINGTON

No. 189-E. In Equity

A. J. BUCK, Plaintiff,

vs.

E. V. KUYKENDALL, Director of Public Works of the State of  
Washington, Defendant.

COMPLAINT—Filed October 31, 1923

To the Honorable Judge of the District Court of the United States  
for the Western District of Washington, Southern Division, sitting  
in equity:

A. J. Buck brings this his bill of complaint against E. V. Kuykendall, Director of Public Works of the State of Washington, defendant; and thereupon plaintiff complains of the defendant and shows unto Your Honor as follows:

# I

That A. J. Buck, plaintiff, is a citizen of the State of Washington, residing at Tacoma.

## II

That E. V. Kuykendall, defendant, is now and has been since the spring of the year 1921 the duly appointed, qualified and acting Director of Public Works of the State of Washington, and is a citizen of such State, residing at Olympia.

## III

That Congress duly enacted on July 11, 1916, an act entitled:

"An act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes."

[fol. 33] That according to the provisions of said act the Federal Government agreed to furnish moneys to States for the purpose of adding in the building of post roads, provided any State desiring such aid would first pass necessary legislation adopting the provisions of said Federal Act. That thereafter the legislature of Washington did duly enact a certain law, entitled:

"An act relating to public highways, rural post roads, assenting to the provisions of an act of Congress entitled 'An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes,' approved July 11, 1916; authorizing and directing the state highway commissioner, the state highway board and the state treasurer to perform certain duties in connection therewith; providing for the apportionment of certain funds therefor; and declaring an emergency;"

being Chapter 76 of the Session Laws of 1917. That such law is herein referred to and made a part hereof the same as if set out in full. Such law went into force and effect immediately upon passage and is now in full force and effect. That by the provisions of said law the State of Washington adopted all the terms and conditions contained in said Federal Act and agreed to abide thereby.

That thereafter Congress duly enacted an act entitled:

"An Act to amend the Act entitled 'An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes,' approved July 11, 1916, as amended and supplemented, and for other purposes;"

which act was passed on November 9, 1921, and which is now in full force and effect. That both of said Federal Acts above set forth provided that all roads receiving any part of the appropriations to be made by the Federal Government should be free of tolls of all kinds. That according to the provisions of said Federal Acts and the State Act hereinbefore set forth, full plans for future construction and reconstruction were presented by the State of Washington

to the Federal Government and adopted by it, including the construction and reconstruction of the "Pacific Highway" extending [fol. 34] from Seattle, Washington, to the boundary line of the State of Oregon at Vancouver, Washington. That the Federal Government, under the provisions of said acts, has paid over to the State of Washington large sums of money which have been received by said State and, as the plaintiff is informed, believes and so charges the fact to be, an amount of money equal to one-quarter of the entire cost of the construction and reconstruction of said strip of said "Pacific Highway" between said above mentioned points. That all of the said portions of said "Pacific Highway," as aforesaid, are under the protection of the said Federal Acts by reason of the said contract made by the State of Washington by the act of its legislature in the year 1917, and thereby this plaintiff has been vested with the right to use such Highway as a thoroughfare. That under the same provision of the same Federal Acts the State of Oregon, having adopted the same by proper act of legislature, has also received a large percentage of the entire cost of construction and reconstruction of the said "Pacific Highway" from the Oregon line opposite Vancouver, Washington, to Portland, Oregon.

#### IV

That the Washington legislature duly enacted a law entitled:

"An Act relating to the use of the public highways and the rights and remedies of persons thereon, providing for the licensing of motor vehicles and collecting, distribution and expenditure of fees therefor, fixing penalties for violations thereof, and repealing Chapter 153 of the Laws of 1913 and Chapter 142 of the Laws of 1915;"

being Chapter 96 of the Session Laws of 1921, and thereafter amended some of the sections thereof by a law duly enacted, entitled:

"An Act relating to the use of the public highways and the rights [fol. 35] and remedies of persons thereon, and amending Sections 6313, 6328, 6330, 6332, 6335, 6339, 6340, 6355 and 6358 of Remington's Compiled Statutes, adding thereto a new section to be known as Section 6358-1 and declaring that this act shall take effect immediately;"

being Chapter 181 of the Session Laws of 1923. Such law, as amended, is now in full force and effect. That such law, as amended, contains full, complete and comprehensive rules and regulations for the operation of motor vehicles of all classes on the public highways of the State, including the requirement of license fees to be paid on each motor vehicle using said highways; and further providing penalties for failure to obey each and every of the provisions thereof. That such law, amended, is hereby referred to and made a part hereof as if set out in full. That this plaintiff

has complied with each and every provision of said law, and is ready, willing and able at all times to comply therewith.

## V

That the Washington legislature duly enacted a law entitled:

"An act relating to the operation of vehicles and the use of public highways, providing for the licensing of persons operating motor vehicles, providing for the enforcement thereof and all other highway and motor vehicle laws and prescribing penalties for violations thereof; and making appropriations;"

being Chapter 108 of the Session Laws of 1921, which law was thereafter amended in part by a law duly enacted, entitled:

"An act relating to the operation of vehicles and the use of public highways, providing for the licensing of persons operating motor vehicles, providing for the enforcement thereof and all other highway and motor vehicle laws and prescribing penalties for violation thereof; and amending Section 234—22 of Pierce's Code, and adding a new section;"

[fol. 36] being Chapter 122 of the Session Laws of 1923. Such law, as amended, is now in full force and effect. That such law, as amended, provides for each operator of a motor vehicle to procure a license to drive the same, paying a fee therefor. That this plaintiff and his drivers have complied with all the provisions of said law as amended and are ready, willing and able at all times to comply therewith. That such law as amended is hereby referred to and made a part hereof as if set out in full.

That the above laws, as amended, to-wit, Chapter 96 of the Session Laws of 1921 and Chapter 108 of the Session Laws of 1921, are the only laws now in full force and effect enacted by the State of Washington relating to the operation of motor propelled vehicles on the public highways of said State, except the law hereafter referred to, being chapter 111 of the Session Laws of 1921, as amended.

## VI

That the legislature of Washington duly enacted a law, entitled:

"An act providing for the additional supervision and regulation of the transportation of persons, and property for compensation over any public highway by motor propelled vehicle: Defining transportation companies and providing for additional supervision and regulation thereof by the public service commission, providing for the enforcement of the provisions of this act and for the punishment of the violations thereof;"

being Chapter 111 of the Session Laws of 1921, and thereafter Section 9 of said law was duly amended by a law, entitled:

"An act to relieve the general fund of the expense of regulating and supervising auto transportation companies, creating a fund and providing fees to cover the cost of such regulation and supervision, an amending Section 9 of Chapter 111 of the Laws of 1921, and making an appropriation;"

[fol. 37] being Chapter 79 of the Session Laws of 1921. That said law went into full force and effect in June, 1921, and as now amended is in full force and effect. Such law, as amended, is hereby referred to and made a part hereof as if set out in full. That by the provisions of said law, as amended, the defendant, as Director of Public Works, is vested with sole and exclusive authority, and it is made his duty, to enforce the provisions of said law, as amended, and to cause the institution of actions, both civil and criminal, against persons or corporations for any alleged violations thereof. Further said defendant is vested with sole authority to grant or refuse a license to any person or corporation to operate on the public highways of the State who come within the definition of auto transportation as set out in said law. Such law also provides that no license can be so granted by said defendant to operate in the same territory occupied by another certificate holder unless the latter fails, refuses or declines to obey the proper orders of said defendant, and then only after a proper hearing. Such law, as amended, vests said defendant with the sole jurisdiction and authority to control, supervise and regulate said auto transportation companies in all matters, including making, altering or changing the rates of fare or time schedules. Such law, as amended, also provides that surety bonds or liability insurance must be carried on each motor vehicle operated, the premium for each policy — vary from \$200 a year to over \$400 a year, depending on the carrying capacity of the vehicle bonded or insured. The said law, as amended, provides that a violation of any provision thereof or the failure to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement made by the defendant shall constitute a gross misdemeanor and punishable as such, being either a fine or imprisonment or both.

[fol. 38]

## VII

That under the provisions of said law, Chapter 111 of the Session Laws of 1921, as amended, the defendant has granted and has issued to the Park Auto Transportation Company a certificate to operate between the cities of Seattle and Tacoma, on the said "Pacific Highway," and the said grantee is now operating between said two cities and is carrying passengers between said two cities and intermediate points; that another certificate under said law has been issued to the Thompson-Smith Company to operate between the cities of Tacoma and Olympia, on said "Pacific Highway," carrying passengers between said points and intermediate points; a certificate also has been issued under said law to the Northwestern Transportation Company to operate between the cities of Olympia and Kelso, on the said "Pacific Highway," carrying passengers between said points and in-



intermediate points; and further, a certificate has been issued under said law to the Camas Stage Company, a Washington corporation, to operate between Kelso, Washington, and Portland, Oregon, over the said "Pacific Highway," carrying passengers between said points and intermediate points. That each one of said companies so operating as above stated has no authority to operate except between said points on said highway as named in its certificate. That the said defendant, although petitioned so to do, has never issued and has refused to issue any certificate under the provisions of said law of 1921, as amended, to any person or corporation for the purpose of carrying through passengers on said "Pacific Highway" between Seattle or Tacoma and the boundary line of the States of Washington and Oregon, and that there is not now any certificate holder entitled to operate a through service on said "Pacific Highway" from Seattle or Tacoma either to the southern boundary line of the State of Washington or to Portland, Oregon. That there is not now any through [fol. 39] line whatever operated between said cities of Seattle or Tacoma, Washington, and Portland, Oregon, carrying through passengers by motor vehicle stages between said points on said "Pacific Highway" or any other highway. Further, that said above named companies by virtue of the certificates granted to them under the provisions of said law are using said parts of said "Pacific Highway" as places of business, taking on and discharging passengers along and on said highway. That such operation on said "Pacific Highway" is not an obstruction to or an interference with the use of said "Pacific Highway" by other operators of motor vehicles.

### VIII

That in July, 1923, the defendant did refuse and decline to grant to this plaintiff a certificate which had been duly applied for, under the provisions of the said law, as amended, being Chapter 111 of the Session Laws of 1921, and Chapter 79 of the Session Laws of 1923, to operate motor vehicles between Seattle, Washington, and the south boundary line of the State at Vancouver, Washington, as part of a through line to Portland, Oregon, carrying passengers between Seattle and Tacoma, Washington, and Portland, Oregon, but not carrying passengers locally in the State of Washington. The business desired and to be carried on being wholly interstate. That the plaintiff did not contemplate to and will not use the said "Pacific Highway," or any part thereof, for doing business along or on the same, but did contemplate to and will take on or discharge passengers on private property therefor and only use said "Pacific Highway" as a thoroughfare and for interstate commerce and in the same manner as any motor vehicle. Rights on private properties at Seattle and Tacoma to load and unload passengers have been acquired by the plaintiff. That the use of said "Pacific Highway" by plaintiff as aforesaid would not obstruct nor interfere with the use of said highway by other motor vehicles, and no stops would be made thereon to take on or discharge any passengers.

That this plaintiff has been engaged for many years last past in the business of transporting passengers by motor stage in the State of Washington, and has made a careful examination into the needs of through transportation by motor stage between the said cities of Seattle and Tacoma, Washington, and Portland, Oregon, and found that there was operated between said cities aforesaid during a period of many months in the year 1922, up to some time in December, 1922, a daily service between the cities of Seattle and Tacoma and Portland by motor stages, and there was a large and growing demand for such character of through service between said cities and states. That he has personally interviewed more than one thousand persons in the cities of Seattle and Tacoma and adjacent territory and has found that such a service would be immediately patronized and would furnish to the public a means of transportation by through stages between said cities in Washington and Oregon that is not now furnished. That any person now desiring to travel by motor stage between said cities of Seattle, Washington, and Portland, Oregon, would be obliged to change stages at Tacoma, Olympia and Kelso, as no through service whatsoever is now given or has been given since the discontinuance of the through service in December, 1922, which service was only discontinued by reason of the threats of the defendant herein to cause the arrest of the then operator of such line, and its agents, servants, employees and drivers, and for no other reason whatsoever, as the operation of said through line was profitable. Further, that the charges for the through transportation established by this plaintiff between the City of Seattle, Washington, and Portland, Oregon, are fixed at \$5.60 and that the present aggregate rate of fare between said points by the said separate stage lines set out hereinabove amounts to \$6.85, and the fare established by plaintiff between the cities of Tacoma, Washington, [fol. 41] and Portland, Oregon, is \$4.60, while the fare now charged for the said trip between said points, with the said changes of vehicles as hereinbefore set forth, is \$5.85. That the fare by railroad between said City of Seattle and Portland, Oregon, is \$5.68, and between Tacoma, Washington, and Portland, Oregon, is \$5.21.

## X

That the plaintiff herein is the owner of a certificate issued by the State of Oregon entitling him to operate motor propelled vehicles carrying passengers on the "Pacific Highway" between the City of Portland and the northern boundary line of the State of Oregon, and by the terms of such certificate the plaintiff is entitled to and desires to commence the said operation in said State as a continuous line between the said cities of Portland, Oregon, and Tacoma and Seattle, Washington, but not to engage in any intrastate business whatever in said States. That the said certificate was so granted by the Railroad Commission of the said State of Oregon under the provisions of the

law of Oregon which was enacted by the State of Oregon in the year 1921, being entitled:

"An act providing for the supervision and regulation of the transportation of persons and property for compensation over any public highway by motor vehicles, motor trucks, motor busses, bus trailers, semitrailers and other motor trailers used in connection therewith, and by other motor vehicles; defining what constitutes transportation for compensation, defining transportation companies, and providing for the supervision and regulation thereof by the public service commission of Oregon; providing for the enforcement of the provisions of this act and for the punishment of violations thereof, and declaring an emergency;"

being Chapter 10 of the Special Session Laws of 1921 as amended by Chapter 205, General Laws of Oregon of 1923; that such law is now in full force and effect. Such law is hereby referred to and made a part hereof as if the same was set out in full.

[fol. 42]

## XI

The plaintiff says further if he undertakes to operate motor vehicles on said "Pacific Highway" between Seattle and Tacoma, Washington, and Portland, Oregon, taking on and discharging interstate, through passengers only on private property in the State of Washington and using said highway as a thoroughfare to engage in said interstate commerce, the defendant will immediately cause the arrest of this plaintiff and his servants, agents, employees and drivers and will continue to cause such arrests to be made, daily charging violations of said law, Chapter 111 of the Session Laws of 1921, as amended. That the plaintiff is obliged to commence his operations in the State of Oregon under the certificate on or before November 12th, 1923, or forfeit the same. That the said defendant has granted certificates on said "Pacific Highway" for the operation in and out of the cities of Seattle and Tacoma of equipment which carry from 25 to 30 people and that said equipment so used thereon is heavier and larger in every respect than the equipment to be used by this plaintiff on said highway.

## XII

The plaintiff says further that the said law, Chapter 111 of the Session Laws of 1921, as amended by Chapter 122 of the Session Laws of 1923, is unconstitutional and void, being in contravention of the Constitution of the United States, the protection of which is invoked by this plaintiff, especially the Fourteenth Amendment thereof and the Commerce Clause, Article 1, Section 8; all the said acts and threatened acts of the defendant are illegal and unlawful, having been performed and threatened to be performed under the provisions of said void and unconstitutional law as aforesaid; that such acts of said defendant, as well as said law, have established and will continue to protect, a monopoly in interstate commerce on said

[fol. 43] "Pacific Highway" by motor vehicles between said cities of Seattle and Tacoma, Washington, and Portland, Oregon.

### XIII

That unless this plaintiff is given protection by injunction, he, his servants, agents, employees and drivers, will be arrested daily in various counties along said "Pacific Highway" and will have to defend numerous suits and actions, and numerous fines and imprisonments will be imposed upon him, his agents, servants, employees and drivers, and he will be unable to engage in said interstate commerce and will forfeit his rights to operate under and by virtue of the certificate issued to him by the State of Oregon, and further the public will not be able to enjoy the right and privilege of a through interstate service by motor vehicles between Seattle and Tacoma, Washington, and Portland, Oregon, and thereby this plaintiff will sustain large, heavy and irreparable loss, damage and injury, and the plaintiff has no plain, speedy and adequate remedy at law.

### XIV

That the matters involved in this controversy exceed in value the sum of \$3,000 exclusive of interest and costs.

### XV

For as such as the plaintiff can have no adequate relief except in this court, and to the end, therefore, that the defendant may, if he can, show why the plaintiff should not have the relief herein prayed, and make full disclosure and discovery of all the matters aforesaid, according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct and perfect answer make to the matters in this bill of complaint hereinbefore stated, but not under oath, an answer under oath being expressly waived, the plaintiff prays that a temporary injunction be granted, restraining the [fol. 44] defendant and all other officers and agents of the State of Washington from in any way and in any wise, enforcing the said law, Chapter 111 of the Session Laws of 1921, as amended, by Chapter 79 of the Session Laws of 1923, against this plaintiff, his agents, servants, employees and drivers while engaging in and carrying on the business of transporting passengers and their personal baggage by motor vehicles into or out of the State of Washington; that as the constitutionality of a state statute and the enforcement thereof by the defendant, an officer, is sought to be enjoined, the plaintiff prays that the court proceed to call in two other judges of this court, one of whom to be a Circuit Judge, for the purpose of hearing and determining the application herein prayed, for a temporary injunction, and that pending the hearing and determination of such application for a temporary injunction, the court will issue a temporary restraining order restraining and enjoining the said defendant, and all other officers and agents of the State of Wash-

ington, from in any way and in any wise, enforcing the said law, as amended, against the plaintiff, his agents, servants, employees and drivers, while engaged in and carrying on said interstate commerce; and that upon the final hearing of this suit, the said law, Chapter 111 of the Session Laws of 1921, as amended, be declared unconstitutional and void insofar as the same applies to interstate commerce, and that such temporary injunction be made permanent, and plaintiff prays for such other, further and proper relief as may be just and equitable in the premises.

W. R. Crawford, Attorney for Plaintiff.

[fol. 45] Jurat showing the foregoing was duly sworn to by A. J. Buck omitted in printing.

[File endorsement omitted.]

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[fol. 46] IN THE UNITED STATES DISTRICT COURT

In Equity. No. 189

[Title omitted]

DECISION—Filed December 7, 1923

The plaintiff, a citizen of the State of Washington, seeks to restrain the defendant, Director of Public Works of the State of Washington, from interfering with his operation of a line of motor vehicles between Portland, Oregon, and Seattle, Washington, travel wholly interstate. He alleges that the Act of Congress of July 11, 1916, as amended November 9, 1921, extending aid to states in the construction of rural post roads and the acceptance of such aid by the legislature of the state, vested in the plaintiff the right to use such highway as a thoroughfare; that he has obtained from the state of Oregon permission to operate a line from Portland to the Washington-Oregon state line at Vancouver; that he has applied to the defendant as Director of Public Works of the state for a certificate of necessity and permission to operate his automobile bus line over the public highways of the State of Washington. Such certificate of necessity, and permission to operate said line, have been denied. The plaintiff further alleges that the defendant has granted certificates to operate to other transportation companies, one from Seattle to Tacoma on the Pacific Highway, another from Tacoma to Olympia on said Pacific Highway, and another from Olympia to Kelso on said Pacific Highway, and that a certificate has been issued in Oregon to the Camas Stage Company, a Washington corporation, to operate between Kelso, Washington, and Portland, Oregon, over the Pacific Highway; that there is no permission granted to operate a through passenger line from Portland to Seattle over said Pacific Highway; that the business is wholly interstate; that the plaintiff expects to use

private terminals at Portland and Seattle and does not expect to use the Pacific Highway, a public thoroughfare, for the taking-on or discharging of passengers. He also states that the fare he expects to charge is \$5.60 one way; that the present fare over the separate lines which are now operating is \$6.85, and alleges that the Act approved March 17, 1921, Chapter 111, Session Laws 1921, page 338, "An act providing for additional supervision and regulation of the transportation of persons and freight for compensation over any public highway by motor propelled vehicle \* \* \*, is unconstitutional; it contravenes the 14th amendment to the Constitution and the commerce clause, Art 1, Sec. 8, and that such act of the defendant has created and will continue to create a monopoly in [fol. 47] interstate commerce upon said Pacific Highway in the operation of motor vehicles between the cities of Seattle and Tacoma, Washington, and Portland, Oregon. Plaintiff states that he has complied with all other motor vehicle laws and regulations of the state.

The question before the court is whether or not the interlocutory injunction shall issue.

W. R. Crawford, Solicitor for Plaintiff.

John H. Dunbar, Attorney General of the State of Washington; Raymond W. Clifford, Assistant Attorney General; E. W. Anderson, Assistant Attorney General, Solicitors for Defendant.

Before Gilbert, Circuit Judge, and Cushman and Neterer, District Judges

NETERER, District Judge:

A like issue was presented to this court, as it is now constituted, in *Interstate Motor Transit Co. v. Kuykendall*, 284 Fed. 882. But for the earnestness manifested by counsel for the plaintiff, who was also attorney for the plaintiff in the named case, we would rest this issue upon what was there said.

It is asserted that the Act of July 11, 1916, *supra*, gave to the plaintiff a vested right to use this highway by reason of the contribution to the construction thereof by the United States and the declaration by Congress that the highway is a "post road." Section 2 of the act, *supra*, says, "That for the purposes of this act the term 'rural roads' shall be construed to mean any public road over which the United States mails now are or may be hereafter transported, excluding every street and road in a place having a population, as shown by the latest available census, of 2,500 or more, except that portion of such street or road along which the homes average more than two hundred feet apart."

[fol. 48] The court judicially knows that Seattle, Tacoma, Olympia, Chehalis, Centralia, and Vancouver are upon the route sought by the plaintiff, and each contains a population in excess of twenty-five hundred. By no stretch of the imagination could the plaintiff, by virtue of the provisions of the Act of 1916, *supra*, assert any interest



in the excepted roads and streets, and his assertion of vested right in any portion of the highway is absolutely baseless.

The Act of Nov. 9, 1921, 42 Stat. 212, amending Act of July 11, 1916, *supra*, explains the general scheme of road construction and provides for cooperative construction and reconstruction of certain systems of highways within the state, the projects upon which expenditures shall be made to be approved by the Secretary of Agriculture in such a manner as will expedite the completion of an adequate system of highways interstate in character. The state shall designate a system not to exceed seven per cent of its total highway mileage which shall receive federal aid, which are to be divided into primary or interstate highways and secondary or intercounty highways. That before any project shall be approved by the Secretary of Agriculture such states shall make provision for said funds required each year of such state for the construction, reconstruction and maintenance of all federal aid highways within the state, the funds to be under the direct control of the state highway department; and the duty is imposed upon the state to maintain the highways. Section 18, Act of Nov. 9, 1921, *supra*, provides:

"That the Secretary of Agriculture shall prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this act, including such recommendations to the Congress and to the State Highway Department as may be deemed necessary for preserving and protecting the highways and insuring the safety of traffic thereon."

The Congress has not legislated with relation to the use of high-[fol. 49] ways, to the construction of which the United States contributed, other than as provided by Section 18, *supra*, and if recommendations have been made by the Secretary of Agriculture to the State Highway Department, the presumption is that such recommendations have been carried out, nothing appearing to the contrary.

It is asserted that the provisions of the Act of March 17, 1921, *supra*, are inoperative as to plaintiff. In *Dent v. Oregon City*, 211 Pac. 909 (106 Ore. 122), the court said:

"The right to use the public highways of the state by the ordinary and usual means of transportation is common to all members of the public without distinction, and extends to those engaged in the business of carrying passengers or freight for hire by such ordinary and usual means of transportation, as well as to individuals pursuing a strictly private business, subject to the power of the state, by legislative enactment, to impose reasonable and impartial regulations upon such use, which power may be delegated by the Legislature to the governing bodies of municipal corporations."

The Oregon court cites *Jitney Bus Assn. v. Wilkes-Barre*, 253 Pa. 462, where the court said "Regulation is not to be carried to the extent of prohibition." The Supreme Court of Washington, in *Hadfield v. Lundin*, 98 Wash. 657, said:



"The streets and highways belong to the public; they are built and maintained at the public expense, for the use of the general public in the ordinary and customary manner. The state, and the city as an arm of the state, has absolute control of the streets in the interest of the public. No private individual or corporation has a right to the use of the streets in the prosecution of the business of a common carrier for private gain, without the consent of the state, nor except upon the terms and conditions prescribed by the state or municipality as the case may be."

In *State v. Seattle Taxicab & Transfer Company*, 90 Wash. 416, the court said:

"Highways are constructed primarily as a convenient passage way for all the people, and no one has an absolute right to use them for his own profit and gain, even though such use be to carry over them people who desire the service."

In *Allen v. Bellingham*, 95 Wash. 12:

"But the use to which the plaintiff proposes putting the streets is not the ordinary or customary use, but a special one. He purposes using them for the transportation of passengers for hire, a use for which they are not primarily constructed."

[fol. 50] In *state ex rel. Shafer v. Spokane*, 109 Wash. 360, and *Northern Pac. Ry. Co. v. Schoenfeldt*, 23 Wash. Dec., Feb. 23, 1923, the Supreme Court of Washington reaffirmed what it said in the cases cited.

To the extent of the State of Washington's intra-state control of its highways by legislative act, as construed by its highest court, this court is bound, no constitutional right intervening.

The state has full power to regulate extraordinary use of its streets and highways by common carriers. *Interstate Motor Transit Co. v. Kuykendall*, supra; *Northern Pac. Ry. Co. v. Schoenfeldt*, 23 Wash. Dec., Feb. 28, 1923, *Davis v. Mass.*, 167 U. S. 43. Public highways are subject to the police powers of the state. *Hendrick v. Maryland*, 235 U. S. 611. A state by legislative act may, under the police power, perform the double function of reasonable regulation of business and raising revenue by a privilege or license fee,—*Bradley v. City of Richmond*, 227 U. S. 477. *Camas Stage Co. v. Kozier*, 209 Pac. 95. *Kane v. New Jersey*, 242 U. S. 160—and is subject to no limitations save those of the due process and equal protection clauses of the fourteenth Amendment. *Gundling v. Chicago*, 177 U. S. 183. The exercise of the police power is a continuing right and may meet the ever changing conditions and necessities of the public. *Lane v. Whitaker*, 275 Fed. 476; *Schoenfeldt v. City of Seattle*, 265 Fed. 726. *McGlothorn et al. v. Seattle*, 116 Wash. 331. The state legislature has a right to delegate to the Department of Public Works the right to determine to what use the highways shall be applied, subject to review by the courts. *Davis v. Mass.*, 167 U. S. 43. *Wilson v. Eureka City*, 173 U. S. 32. *Ex parte Kollock*, 165 U. S. 526. *Brad-*

ley v. City of Richmond, *supra*. Sec. 18, Act of Nov. 9, 1921, *supra*.  
Dent v. Oregon City, *supra*.

The objection to the Act of March 17, 1921, *supra*, because of [fol. 51] requirements for the safety of passengers, is answered by the Supreme Court in the Second Employers' Liability cases, *Mondou v. N. Y., N. H. and H. R. Co.*, 223 U. S. 50, where the court held that any measure which would impel the carrier to avoid or prevent negligent acts would be a proper regulation of commerce.

"Safety of traffic" (Act Nov. 9, 1921 *supra*) must be determined by capacity of the highway, amount of travel, skill of driver, responsibility of operator, and demands to use the highway for ordinary uses as distinguished from extraordinary uses, such as a carrier for hire.

The Supreme Court of Rhode Island in *Gizzarelli v. Presbury*, 117 Atl. 359, said:

"Authority to use the public highway as a common carrier of passengers for hire is not a right belonging to the individual, but is in the nature of a privilege. \* \* \* Due consideration for the safety of the public requires that a careful selection should be made of the individuals to whom authority is given to use the public highways as carriers of passengers for hire."

The state may not under the guise of regulations arbitrarily prohibit the use of the highway to the plaintiff. Such issue, however, is not before the court, as the plaintiff has not complied with any provisions of the challenged act and at bar announced that he did not propose to comply with the provisions of the act, for the reason that he had a right paramount to its provisions. When the plaintiff disposes himself in harmony with the reasonable provisions of the act and is denied permission to operate, the courts are open to grant such relief as may be warranted by the law and facts. *Interstate Motor Transit Co. v. Kuykendall*, *supra*. *Vandalia R. R. v. Public Service Com.* 242 U. S. 255.

We might rest the decision here, but in view of the argument will say that while the Act of June 8, 1872, Sec. 7456 C. S., provides that all waters, canals, roads, etc., over which mail is carried and letter carrier routes established in a city or town, and all railroads in operation, are declared "post roads," yet such fact does not deprive the state of the police power thereof. In *Commonwealth v. Closson*, 118 N. E. 653 (Mass.) a mail carrier failed to comply [fol. 52] with municipal regulations and was arrested. The court said:

"While undoubtedly they are post roads under Act Cong. March 1, 1884, C. O., enacting that 'all public roads and highways while kept up and maintained as such are hereby declared to be post routes' (U. S. Comp. St. 1916, Sec. 7457) and whoever knowingly and willfully obstructs or retards (the passage of the mail, or any carriage, \* \* \* driver, or carrier \* \* \*) is upon conviction subject to fine or imprisonment, or both, by U. S. Rev. Sts.

Sec. 3995, Act of March 4, 1909, c. 321, Sec. 201, 35 Stat. 1127 (Comp. St. 1916, Sec. 10371, yet the ways remain public ways laid out and maintained by the commonwealth, which has the exclusive power not only of alteration and of discontinuance, but to make and enforce reasonable regulations for their use. Nor do the facilities thereby afforded for transportation of the mails confer extraordinary rights upon mail carriers to use the ways as they please, or necessarily or impliedly do away with the power of supervision and control inherent in the state. *Commonwealth v. Breakwater Co.*, 214 Mass. 10, 100 N. E. 1034, *Postal Telegraph Cable Co. v. Chicopee*, 207 Mass. 341, 350, 93 N. E. 927, L. R. A. (N. S.) 997; *Dickey v. Turnpike Co.*, 7 Dana (Ky.) 113; *Searight v. Stokes*, 3 How. 151, 11 L. Ed. 537; *Price v. Pennsylvania R. R.*, 113 U. S. 221, 5 Sup. Ct. 427, 28 L. Ed., 980; *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; *Martin v. Pittsburg & Lake Erie R. R.*, 203 U. S. 284, 27 Sup. Ct. 100, 51 L. Ed. 184, 8 Ann. Cas. 87."

As was said in *Interstate Motor Transit Co. v. Kuykendall*, supra, the act challenged does not seek to regulate interstate commerce. It expressly disclaims such purpose. It seeks to regulate operation over the public highway for which the state is spending many millions of dollars for construction and maintenance. If one concern can establish a terminal across the state line and operate over the highways in this state without regulation, it is reasonable to presume that others will do likewise, and added confusion would arise which would be foreign to the intended ordinary use of such highways and to the concluding thought of Section 18, Act of November 9, 1921, supra, "To insure the safety of public travel," the burden of which rests upon the state, and might jeopardize life, limb and property of the private citizen of the state attempting to use the highway. Citizens of the state have a right to the enjoyment of their highways and the use of the same must be regulated so that all persons enjoying the privilege may not be subject to injury or death. As was said by the Supreme Court in *Hendricks v. Maryland*, supra,

"In the absence of national legislation covering the subject, the state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation of its highways of [fol. 53] all motor vehicles—those moving in interstate commerce as well as others \* \* \*. This is but an exertion of the police power uniformly recognized as belonging to the states and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a block or material burden to interstate commerce \* \* \*. The amount of the charges and method of collection are primarily for determination by the state itself, and so long as they are reasonable and are fixed according to a uniform, fair, and practical standard, they constitute no burden on interstate commerce." \* \* \*

The Supreme Court of Oregon, in *Camas Stage Co. v. Kozer*, *supra*, at page 97, after quoting Sec. 8, Art. 1, of the Constitution, said:

"Congress has exercised the power granted it in relation to interstate commerce in a variety of acts, but it has passed no statute that in any way inhibits the exaction by the state of the fees in question by way of compensation from the plaintiff for the privilege of driving its motor cars over the highways of this state. State laws may affect interstate commerce without conflicting with the constitutional provision appealed to.

Nor is the power to grant a franchise to whom it will a monopoly against law or public policy. *Cooley's Constitutional Limitations*, 7th Ed. 564; *Haddad v. State*, 201 Pac. 845 (Ariz.); *People v. Wilcox*, 100 N. E. 705 (N. Y.); *Utilities Commission v. Garviloch*, 181 Pac. 272, (Utah); *Hatfield v. Lundin*, 98 Wash. 657; *Allen v. Bellingham*, 95 Wash. 12. Nor does the 14th amendment create any right in a citizen to use the public property in defiance of the laws of the state. *Davis v. Mass*, *supra*. *Lutz v. New Orleans*, 225 Fed. 978. *Dent v. Oregon City*, *supra*.

What has been said precludes the necessity of discussing the question of tolls. We may add, however, that the Supreme Court in *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, and in *Western Union Tel. Co. v. Richmond*, 224 U. S. 160, held exemption from payment of toll shall not grant unrestricted right to use public property, and in *St. Louis v. Western Union Tel. Co.*, *supra*, the court said:

"It is a misconception, however, to suppose that the franchise or privilege granted by the Act of 1866 carries with it the unrestricted right to appropriate the public property of the state."

[fol. 54] In *Kane v. New Jersey*, 242 U. S. 160, Justice Brandeis for the court, said:

"It is clearly within the discretion of the state to determine whether or not the compensation for the use of its highways by automobiles shall be determined by way of a fee payable annually or semi-annually, or toll based on mileage, or otherwise."

From no viewpoint from which the issue can be approached can the plaintiff assert the right contended for. The interlocutory injunction is denied.

FOOTNOTE.—Other cases of interest but not pertinent to the issue before the court, are: *Gas Co. v. Hallanan*, *State Tax Com'r*, 257 U. S. 277; *Eureka Pipeline v. Hallalan*, *State Tax Com'r*, 257 U. S. 265; *Lemke v. Farmers' Grain Co.*, 258 U. S. 50; *5th Ave. Coach Co. v. N. Y.*, 221 U. S. 467. *Pullman Co. v. Kansas*, 216 U. S. 56; *State v. Nor. Pac. Express Co.*, 80 Wash. 309.

[File endorsement omitted.]

[fol. 55]

## IN UNITED STATES DISTRICT COURT

[Title omitted]

## MOTION TO DISMISS

Comes now the defendant E. V. Kuykendall, Director of the Department of Public Works of the State of Washington, and moves the Court to dismiss the above entitled cause for the reason and upon the ground of lack of jurisdiction of the subject matter and parties to this cause by reason of the nonjoinder of indispensable and necessary parties defendant thereto.

This motion is based on all the files and records in the above entitled case and upon the affidavit of E. V. Kuykendall hereto attached.

John H. Dunbar, Attorney General; Raymond W. Clifford, Assistant Attorney General; E. W. Anderson, Assistant Attorney General, Solicitors for Defendant.

[fol. 56]

## IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF E. V. KUYKENDALL—Filed December 24, 1923

UNITED STATES OF AMERICA,

Western District of Washington,  
Southern Division, ss:

E. V. Kuykendall, being first duly sworn on oath deposes and says: That he is the defendant named in the above entitled proceeding; that he is now and has been since on or about the effective date of chapter 111, of the Session Laws of 1921 of the State of Washington, the duly appointed, qualified and acting director of the department of public works of said state, and as such charged with the duty of administering the provisions of chapter 111, aforesaid; that Northern Pacific Railway Company, Great Northern Railway Company, Oregon-Washington Railroad and Navigation Company, American Railway Express Company, Park Auto Transportation Company, Thompson and Smith Transportation Company, Northwest Transportation Company, and Camas Stage Company are engaged in intrastate and interstate commerce or both and in the carriage of persons and property or both between the cities of Seattle, Washington, and Portland, Oregon, and intermediate points; that the Northern Pacific Railway Company, the Great Northern Railway Company, and the Oregon-Washington Railroad and Navigation Company, thru joint agreements, own, operate and maintain a rail line between Seattle and Tacoma Washington and Portland, Oregon, and furnish freight, passenger, express, and mail service

[fol. 57] between said points and to all intermediate points proposed to be served by plaintiff; that the American Railway Express Company is engaged in the transportation of express matter in intrastate and interstate commerce over the lines of the common carrier railroads last above mentioned and furnishes express service between Seattle, Washington, and Portland, Oregon, and to all intermediate points proposed to be served by plaintiff; that Park Auto Transportation Company, Thompson and Smith Transportation Company, Northwest Transportation Company, and Camas Stage Company are holders of Certificates of Public Convenience and Necessity duly and regularly issued to them by affiant as Director of the Department of Public Works of the said State under the provisions of Chapter 111 of the Session Laws of 1921 of the State of Washington; that the certificate holders hereinbefore named, operating motor propelled vehicles over the highways of the State of Washington between Seattle and Portland, have an exclusive right under the provisions of said chapter 111 to so operate their motor propelled vehicles in the carriage of persons and property both interstate and intrastate, and under the provisions of said chapter 111 their right to exclusively operate under said chapter 111 in the territory that they are serving cannot be interfered with or another certificate to so operate be granted save only when such existing auto transportation companies holding certificates will not provide service to the traveling and shipping public to the satisfaction of said Department, and then only after a hearing has been had and an order entered directing the certificate holders to furnish such additional service and a refusal or failure by said certificate holders to obey said order; that the auto transportation companies mentioned herein cover the entire route between Seattle, Washington and Portland, Oregon, and that a passenger seeking transportation by motor propelled vehicle from Seattle, or any point along the [fol. 58] route of said companies, for Portland, or a passenger seeking transportation by motor propelled vehicle from Portland for Seattle or any point in the State of Washington along the route of the named auto transportation companies, can do so, and obtain continuous passage, the said auto transportation companies having schedules so arranged and bus stations used in common so that such continuous passage is obtainable and that said auto transportation companies are now carrying passengers between Seattle and Portland and intermediate points.

Further than this deponent saith naught save that this affidavit is made in support of a motion to dismiss herewith attached.

E. V. KUYKENDALL.

Subscribed and sworn to before me this 23d day of December, 1923. Sam L. Crawford, Notary Public in and for the State of Washington, Residing at Olympia.

[File endorsement omitted.]



[Title omitted]

DECISION—Filed January 7, 1924

On December 7, 1923, this court denied an interlocutory injunction on plaintiff's application. Upon that application it did not appear that the plaintiff had complied with all of the laws of Washington with relation to the operation of motor vehicles on public highways, and it was stated at bar that the plaintiff declined to so comply. In deciding the case the court said:

"The state may not, under the guise of regulation, arbitrarily prohibit the use of the highway to the plaintiff. Such issue, however, is not before the court, as the plaintiff has not complied with any of the provisions of the challenged act and at bar announced that he did not propose to comply with the provisions of the act for the reason that he had a right paramount to its provisions. When the plaintiff disposes himself in harmony with the reasonable provisions of the act and is denied permission to operate, the courts are open to grant such relief as may be warranted by the law and facts."

Thereafter the plaintiff was granted permission to file an amended complaint, in which he states that he has complied with all of the provisions of the laws of the State of Washington, and at bar asserts that he is willing to comply with all of the laws of the state, and the rules and regulations of the Department of Public Works of the State, and further states that the defendant refused to grant said certificate or license to the plaintiff on the sole ground that the owners of four certificates operating between different termini could, by interchanging passengers at common termini, engage in interstate commerce between Seattle, Washington, and Portland, Oregon, and would furnish, together with the railroads operating between said points, adequate transportation, and further, that the plaintiff had not shown sufficient financial ability to warrant the Director in issuing a certificate to engage in said interstate commerce, as, if it were granted, the plaintiff might not be able to operate; that the plaintiff had complied with all the provisions of Chapter 111 insofar as he had been permitted so to do by the defendant, and that he was ready, willing and able, financially and otherwise, to comply with all the provisions of said law, and that he offered so to do.

An interlocutory injunction is asked. In response to *to* the show [fol. 60] cause order the defendants filed an affidavit, which is not denied, setting out a copy of the order of adjudication of the Department of Public Works of Washington upon the application of the plaintiff for a certificate of convenience and necessity, in which the department found that the plaintiff was not, prior to January 15, 1921, operating as an auto transportation company over the proposed route, and was entitled to a certificate of public convenience and necessity solely upon the ground of public convenience and necessity, and further found that the N. P. Ry. Co., the G. N. Ry. Co.,



and the O. W. R. R. & Nav. Co., through joint agreement, operate and maintain a rail line between Seattle and Tacoma, Washington, and Portland, Oregon, carrying freight, passengers, express and mail between said points and to all intermediate points proposed to be served by said applicant, and that said railways operate six passenger and express trains daily from Seattle to Portland and six passenger trains and express trains daily from Portland to Seattle, leaving both termini at reasonable and convenient hours of the day and night, thereby furnishing to the travelling public first class, comfortable, convenient and expeditious service, that in connection with the passenger service furnished by the railroads, they operate sleeping cars and dining cars, and care for the needs and comfort of travellers upon said lines. A reasonable number of passenger, express, and mail trains adequately serve the needs and convenience of the intermediate points, it was found by the department; that the applicant proposed to operate over the Pacific Highway, a main north and south state road, that said state highway practically parallels the railway lines above mentioned for the entire distance from Seattle to Portland and passes through all the intermediate points above mentioned; that all points along the said Pacific Highway from Seattle to the Columbia River and Portland, Oregon, through which said applicants and each of them propose to pass, and the only route proposed by said applicants, was already served by other auto transportation companies, all operating under certificates of public convenience and necessity heretofore granted, said auto transportation companies having provided adequate terminal facilities, including waiting rooms and comfort stations for passengers and garages for the inspection and repair of busses; that said auto transportation companies now have their schedules so coordinated as to provide a daily service between Seattle and Portland. That "a person may leave Seattle in the morning and by connecting carriers arrive in Portland the same day, and vice versa;" that such service is reasonable and adequate, and entirely sufficient to care for interstate travel at the present time. Said carriers testified at the hearing before the Director of Public Works, as disclosed by the record, that they were willing to provide additional through service between Seattle and Portland at any time said Department of Public Works should so direct, and that if public convenience should require such additional service these carriers should be entitled to an opportunity to furnish it. The findings further state that A. J. Buck proposes to furnish service from Seattle and other points heretofore mentioned to Portland, making two trips per day each way. The trip from Seattle to Portland requires about nine hours running time and it would be necessary to make stops approximately at the terminal points of the present transportation companies to permit passengers to eat, visit comfort stations, and to permit inspection and repair of the auto busses; that it would be necessary to furnish at these points adequate [fol. 61] facilities such as waiting rooms, comfort stations, etc., for the passengers, and garages for repairs upon auto busses. The expense of this duplication of facilities and service would undoubtedly in time be reflected in increased charges to the travelling public. The

testimony at the hearing did not show that these applicants or either of them had made adequate arrangements for any of these facilities; that the testimony did not show that said applicants or either of them were possessed of financial ability to successfully undertake the operation of such a venture. It affirmatively appeared, according to the findings of said Department of Public Works, that both A. J. Buck and the Interstate Motor Transit Company were practically without means and were depending for finances upon the promises of other parties, which promises were vague and conjectural and not shown to be enforceable; that public convenience and necessity did not require the operation of the service sought or proposed to be given by the applicants or either of them and it was therefore ordered that the plaintiff's application for certificate of public convenience and necessity to operate as auto transportation in furnishing passenger and express service between the points heretofore indicated, be denied.

With this application were consolidated other applications, and parties appeared as follows, at the hearing:

Albert J. Buck, D. V. Halverstadt, of Guie & Halverstadt, Attorneys, Seattle.

Interstate Motor Transit Co., W. R. Crawford, Attorney, Seattle.

Park Auto Transportation Company, Thos. R. Murphine, Attorney, Seattle.

Thompson & Smith Transportation Company, Thos. M. Vance, Attorney, Olympia.

Puget Sound Electric Ry. Co., C. W. Howard, Attorney, Bellingham.

C. M. & St. P. Ry. Co. and American Railway Express Co., L. B. da Ponte, Attorney, Seattle.

O. & W. R. R. & Nav. Co., W. A. Robbins, Attorney, Portland.

Great Northern Railway Co., Thomas Balmer and A. J. Clynych, Seattle.

A protest against the granting of a certificate of convenience and necessity to the plaintiff was filed by the following concerns; with the Department of Public Works:

Park Auto Transportation Co.

Thompson and Smith Transportation Co.

Northwest Transportation Co.

Camas Stage Co.

Chicago, Milwaukee & St. Paul Ry. Co.

Northern Pacific Ry Co.

Great Northern Ry Co.

Oregon-Washington R. R. & Nav. Co.

American Railway Express Co.

Tenine Citizens Club.

Puyallup Commercial Club.

Centralia Chamber of Commerce.

Tacoma Chamber of Commerce and Puget Sound Electric Railway.

[fol. 62] W. R. Crawford, Esq., Solicitor for Plaintiff.

Hon. John H. Dunbar, Attorney General, State of Washington; Raymond W. Clifford, Esq., and E. W. Anderson, Esq., Assistant Attorneys General of the State of Washington, Solicitors for Defendant.

Before Rudkin, Circuit Judge, and Cushman and Neterer, District Judges

NETERER, District Judge:

Every issue now presented has been disposed of in *Interstate Motor Transit Co. v. Kuykendall*, 284, Fed. 882, and cases cited, and in decision in this cause filed December 7, 1923, and cases cited, except whether, under the guise of regulation, the defendant arbitrarily prohibits the use of the highway to the plaintiff.

The State of Washington has control of its highways—cases above cited—and the state power continues where the subject is peculiarly of local concern until Congress acts and by its valid interposition limits the exercise of local authority. *Minn. Rate Cases*, 230 U. S. 352. *Penn Gas Co. v. P. S. Com.* 252 U. S. 25, *Mo. P. R. Co. v. Larrabe Flour Mill Co.* 211 U. S. 612. While those cases have relation to intrastate rates, the principle enunciated is peculiarly applicable to the issue here.

The challenged law is not designed to regulate interstate commerce. Its purpose is of peculiar local concern, that of promoting safety, convenience, welfare, health and comfort of the public in the use of highways constructed and maintained at public expense—*Northern Pac. Ry. Co. v. Schoenfeldt*, 23 Wash. Dec. 299; *Interstate Motor Transit Co. v. Kuykendall*, supra, and cases cited,—which the state may do through its police power. *Hendricks v. Md.* 235 U. S. 610; *Kane v. New Jersey*, 242 U. S. 160.

The plaintiff has no right to use the highway as a common carrier for hire. It is only a privilege which may be regulated by the state [fol. 62½] in the absence of legislation by the Congress, having due consideration for the safety, health, convenience, welfare, and comfort of the travelling public, and includes those travelling in public conveyances and those travelling in private conveyances upon the highway. The record before the court is conclusive that the privilege withheld from the plaintiff was not arbitrarily denied under the guise of regulation. It is not necessary to add or multiply words or phrases. What has been here said, and in the cited cases, is conclusive. The interlocutory injunction is denied.

FOOTNOTE.—Appended are excerpts from the decision of the Department of Public Works of Washington.

California Railroad Commission, P. U. R. 1920—C-639, *In re Wilson & Co.*, said:

"The evidence in this proceeding does not warrant the commission granting the order herein sought for the reason that there is no showing that existing lines are unable to furnish transporta-

tion by automobile stage over the route herein sought; and if a through route and joint rate is desired by the public, and existing stage lines cannot themselves agree on an adjustment of schedules and rates which will make possible a through route and joint rate between the points sought to be served by applicant, complaint to the Commission that a through route and joint rate is necessary will receive investigation, and an order of the Commission will issue based on the evidence adduced at a public hearing. The remedy for the adjustment of conditions which may not be desired by the public is not the establishment of a competing line, thereby dividing the traffic to the extent that existing authorized lines are unable to render the character of service demanded by the public and required by the regulation of this Commission."

New York Pub. Serv. Com., In Re Graves, P. U. R. 1920—E 131, said:

"It has been lately held by the California Railroad Commission In re P. A. Wilson & Company. P. U. R. 1920C, 635, decided February 11, 1920, that a certificate to operate an auto stage service [fol. 63] will not be granted for the purpose of affording through service between designated points where existing lines render adequate service between intermediate points.

"This I think, is consistent and entirely in line with the practice of this Commission to discourage competition where existing lines are rendering adequate service, and the position is not changed by the fact that the proposed line in question asks to render a through service where such service may be availed of only by using a succession of established carriers.

"In this, as in other cases, competition, not demanded to serve a public necessity, will tend to the demoralization and perhaps destruction of the facilities now enjoyed, and thus, in the end, work to the disadvantage and not the convenience of the public."

The Illinois Commerce Com., in Re Clark Truck Co., P. U. R. 1923-A, page 328, said:

"Under such conditions this Commission will not deliberately authorize the establishment of a directly competing motor vehicle line when the evidence shows that the localities involved are being served in a reasonably adequate manner, and that the intrusion of a competing line would seriously impair the ability of the railway line to render improved service commensurate with the needs and demands of the community, industries and persons served and would operate to the loss, detriment and damage of the railway."

And in Re Austin Brothers Transfer Co., P. U. R. 1923-C Page 222, the Illinois Commerce Com. said:

"The Commission further finds that in passing upon and determining the question of the issuance of a certificate of convenience and necessity to a motor bus line authorizing it to engage in the transportation of passengers and baggage for hire, or in passing

upon the granting of a certificate of convenience and necessity to one of two competing motor bus lines, both of which propose to engage in such business over substantially the same route, it is important and essential that the applicant shall have such a financial responsibility, such an operating experience and such a guarantee of sufficient business as to warrant a successful operation of a permanent motor bus enterprise, and that the persons interested in the operation of such motor bus lines have such an experience in motor bus operation and such a general business experience and ability and officers of such a general business experience and ability that it will assure to the Commission that if operation of a motor bus line is commenced under a certificate of convenience and necessity, it will become a permanent part of the transportation system of the state, and particularly of the community through which it proposes to operate.

"The Commission believes that the temporary operation of any transportation system within a community, whether it be in the form of a motor bus line or in some other form, which does not possess the certainty and security of developing into a permanent operation, and which lacks those particular features which are herein [fol. 64] described with reference to business ability of the utility and of its officers, is not a public convenience and necessity and that without proof of such facts a utility does not possess the composite parts necessary to so serve the public as to satisfy public convenience and necessity, and that in such instances the application made for a certificate of convenience and necessity should be denied."

And the same Commission in *Re O. L. Bromley* said:

"A part of the route proposed to be traversed by petitioner's motor vehicles parallels the street railway system in the city of Decatur and the granting of a certificate of convenience and necessity to the petitioner herein, if the route traversed is parallel with the street railway system, creates dual service the necessity for which is not apparent upon this record.

"The record fails to show the inadequacy of the present facilities of the street railway service. It will always be true that the more service rendered, the greater convenience to the public, yet the duplicating of service necessarily means a greater cost and such duplicate service will not be authorized unless substantial justice and a necessity for additional transportation service is manifest."

[File endorsement omitted.]

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[fol. 65]      IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION TO DISMISS ON ACCOUNT OF WANT OF JURISDICTION—Filed January 21, 1924

This cause coming on to be heard upon the motion of E. V. Kuykendall, Director of Public Works, of Washington, to dismiss the

same on account of want of jurisdiction and lack of indispensable parties, and the Court having heard the arguments of counsel and being full- advised in the premises,

It is ordered, adjudged and decreed that said motion be and the same is hereby denied.

To all of which the defendant excepts and such exceptions are hereby allowed.

Enter:

Jeremiah Neterer, Judge.

[File endorsement omitted.]

[fol. 66]

IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing pages numbered one to 66, inclusive, contain a true and correct transcript of the records and proceedings in the case of A. J. Buck, Plaintiff, versus E. V. Kuykendall, Director of Public Works of the State of Washington, Defendant, Cause No. 189-Equity, as required by the præcipes of Attorneys for the Appellant and Appellee herein, filed and herein shown as the originals appear on file and of record in my office in said District at Tacoma.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by and on behalf of the Appellant and of the Appellee herein, for making record, certificate and return to the Supreme Court of the United States, in the above entitled cause, to-wit:

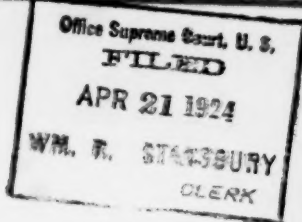
Clerk's Fees (Sec. 828 R. S. U. S.) for making record, certificate and return for appellant, 60 folios @ 15¢ each . . . . .	\$9.00
Clerk's Fees for making record and return for appellee, 112 folios @ 15¢ each . . . . .	16.80
Certificate of Clerk to Transcript, 3 folios @ 15¢ each and Seal . . . . .	.65

Attest my hand and the seal of said District Court, at Tacoma, in said District, this 10th day of March, A. D. 1924.

F. M. Harshberger, Clerk, by Alice Huggins, Deputy.

Endorsed on cover: File No. 30,234. W. Washington D. C. U. S. Term No. 924. A. J. Buck, appellant, vs, E. V. Kuykendall, Director of Public Works of the State of Washington. Filed March 29th, 1924. File No. 30,234.

FILE COPY



IN THE  
SUPREME COURT OF THE UNITED STATES.  
OCTOBER TERM, 1923.

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No. 824. 345

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A. J. BUCK, APPELLANT,

v.

E. V. KUYKENDALL, DIRECTOR OF PUBLIC WORKS OF  
THE STATE OF WASHINGTON, APPELLEE.

---

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF WASHINGTON.

---

PETITION FOR A STAY.

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MERRILL MOORES,  
*Counsel for Appellant.*





IN THE  
SUPREME COURT OF THE UNITED STATES.  
OCTOBER TERM, 1923.

---

**No. 924.**

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A. J. BUCK, APPELLANT,

*v.*

E. V. KUYKENDALL, DIRECTOR OF PUBLIC WORKS OF  
THE STATE OF WASHINGTON, APPELLEE.

---

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF WASHINGTON.

---

**PETITION FOR A STAY.**

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*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, A. J. Buck, is attempting to operate an Interstate Motor Bus line between Seattle, Washington, and Portland, Oregon, over the Pacific Highway, a Government

aided road, toll exempt under the Federal Road Aid acts. Section 4, Chapter III, Laws of the State of Washington, as amended, 1923, provides that no auto transportation company may operate in that State without a certificate from the Director of Public Works. The same section provides that when an applicant requests a certificate to operate in a territory already served by a certificate holder, the Director of Public Works shall have power to grant such a certificate only in case the transportation companies already serving the territory in question do not provide transportation to the satisfaction of the Director. Petitioner applied to the Director of Public Works for such a certificate, which was refused on the ground that there was no public convenience and necessity for such interstate motor bus transportation. The reason given was that there was already a certificate holder operating between Seattle and Tacoma, Washington; another certificate holder operating between Tacoma and Olympia; a third between Olympia and Kelso, and a fourth between Kelso, Washington, and Portland, Oregon; all operating on the Pacific Highway and the four together covering the entire distance between Seattle, Washington, and Portland, Oregon. No certificate has been issued authorizing a through line between Seattle, Washington, and Portland, Oregon, nor is there such a through line now operating.

Prior to applying for a certificate to operate between Seattle, Washington, and Portland, Oregon, petitioner interviewed over a thousand persons in that section and found there was a general demand for such a through service. In fact, there was such a service maintained by another company in the first part of 1923. This line was compelled to

cease operations because of a refusal of the Director of Public Works to grant a certificate, coupled with threats of prosecution and the penalties prescribed in Chapter III, section 4, above referred to. While it operated the line it was financially successful on a fare of \$5.50 from Seattle to Portland, Oregon.

Petitioner made it clear to the Director of Public Works of Washington that he would not use the said "Pacific Highway" to do business on but simply as an interstate thoroughfare, and would take on and discharge passengers on private property already acquired.

Petitioner was granted a license by the State of Oregon to operate his motor vehicles on the "Pacific Highway" in that State as part of a continuous, interstate service between Portland, Oregon, and Seattle, Washington. In order to preserve his rights under this license petitioner was required to commence operations before November 12, 1923, and upon continued refusal on the part of the Director of Works of the State of Washington, filed his complaint in the District Court of the United States for the Western District of Washington on October 31, 1923. On the same day a temporary restraining order was granted, upon giving \$500 bond. Such order restrained said Kuykendall, Director of Public Works, from enforcing the provisions of Chapter III, section 4, as amended. Petitioner thereupon commenced operation of his through line between Portland, Oregon, and Seattle, Washington, charging a rate 25 per cent less than other carriers, the business increasing all the time.

On December 7, 1923, the District Court handed down its decision denying an interlocutory injunction. (295 Fed., 197, Advance Sheets.) In its opinion it adverted to the

fact that the record did not show that petitioner had complied with the regulatory provisions of the Washington law relative to operation of motor vehicles on the public highways. Thereafter, permission was granted petitioner to file an amended complaint, showing such compliance with the laws of the State of Washington. Upon filing such amended complaint showing compliance with the provisions of the laws of Washington, the case came on again for hearing and on January 7, 1924, the District Court handed down a supplemental opinion and entered a final decree denying an interlocutory injunction and dismissing the bill. The ground taken generally by the District Court was that the requirement of a certificate as a condition of doing business, and the prohibition in the State Statute against issuing such certificate for a territory already served to the satisfaction of the Director of Public Works, was a valid police regulation of the State. From this final decree petitioner has perfected an appeal to this Court, on the grounds:

1. That the provision of Chapter III, above referred to, prohibiting the Director of Public Works from issuing a certificate in a territory served satisfactorily to him by other certificate holders, amounts to a restriction upon interstate commerce. It is obvious that, however properly said Director may be the judge of the public necessity and convenience of said service to the people of Washington, he is not the judge, nor can a Washington statute make him the judge, of the necessity in the State of Oregon for through service to points in Washington. The Federal control over interstate commerce was designed to prevent one State undertaking to be the judge of the method by which another State

might do business with it, or through it with another State or foreign country.

2. There being no interstate motor bus line between Seattle, Washington, and Portland, Oregon, the provision of Chapter III, favoring certificate holders and prohibiting issuance of a new certificate in their territory, amounts to a prohibition against interstate commerce in that territory.

3. In the same way, there is a discrimination against *interstate*, in favor of *intrastate*, commerce, based upon mere priority in time.

4. There is the creation of a monopoly in the present certificate holders on Federal Aided Interstate Highways.

5. There is a prohibition against carrying on interstate commerce under the same rules and regulations as intrastate commerce.

6. There is a violation of the State's contract with the Federal Government covering said Federal Aided Interstate Highway.

7. There is a taking of property without due process of law, as above described.

The amount involved in this case exceeds \$3,000 besides costs.

After the final decree herein, a written stipulation was made with the said Kuykendall, Director of Public Works, that the bond of \$500 required for the temporary restraining order should be cancelled and released on the ground that no damage had resulted from the issuance of said restraining order.

On the other hand, petitioner, if not allowed to continue in business pending the appeal to this Court, will lose not only his franchise in Oregon, but all his fees, insurance premiums paid under Washington and Oregon laws, and all the profits from operation of his line, and the public will lose the convenience of said lines reflected in the profits from the operation thereof.

Application for a stay was made to the District Court and was by that Court denied on March 31st last, because the case is pending in this Court on appeal.

Wherefore, A. J. Buck, petitioner herein, prays that an order be made, restraining, until the final determination by this Court of the appeal herein, E. V. Kuykenda<sup>1</sup> Director of Public Works of the State of Washington, appellee herein, his agents, servants, employees, from arresting or causing the arrest or in any way interfering with or obstructing the appellant, his agents, servants, employees and drivers from engaging in interstate commerce by carrying passengers and their personal baggage on motor propelled vehicles on the public highways of the State of Washington between the City of Seattle, Washington, and the southern boundary line of Washington at Vancouver, Washington, or intermediate points, upon the ground that said appellant has not been granted a certificate or license to engage in such interstate commerce, as provided for in said Chapter III, of the session laws of 1921, as amended, of Washington; but such order shall in no way protect the appellant, his agents, servants, employees and drivers against arrest for the violation of any provisions of the laws of the State of Washington, except such provision relating to certificates contained in said Chapter III, as amended, or for such order as may be proper, the



premises considered, agreeable to the usages and practices of law.

CITY OF WASHINGTON,

*District of Columbia, ss:*

Merrill Moores, being first duly sworn, on oath deposes and says: That he is counsel for the appellant in the above entitled cause, that he has read the foregoing petition for a stay and knows the contents thereof, and that the matters set out therein are true, except as to the matters set out on information and belief, and as to such matters it is true as he verily believes.

MERRILL MOORES.

Subscribed and sworn to before me this 17th day of April, 1924.

C. ELMORE CROPLEY,  
*Notary Public, District of Columbia.*

## IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 924.

A. J. BUCK, APPELLANT,

v.

E. V. KUYKENDALL, DIRECTOR OF PUBLIC WORKS OF THE  
STATE OF WASHINGTON, APPELLEE.On Appeal from the District Court of the United States for  
the District of Washington.To Honorable JOHN H. DUNBAR,  
*Attorney General of Washington.*

SIR:

Please take notice that a petition for a stay in the above-entitled cause, a copy of which is handed you herewith, will be submitted to the Supreme Court of the United States on April 21st next.

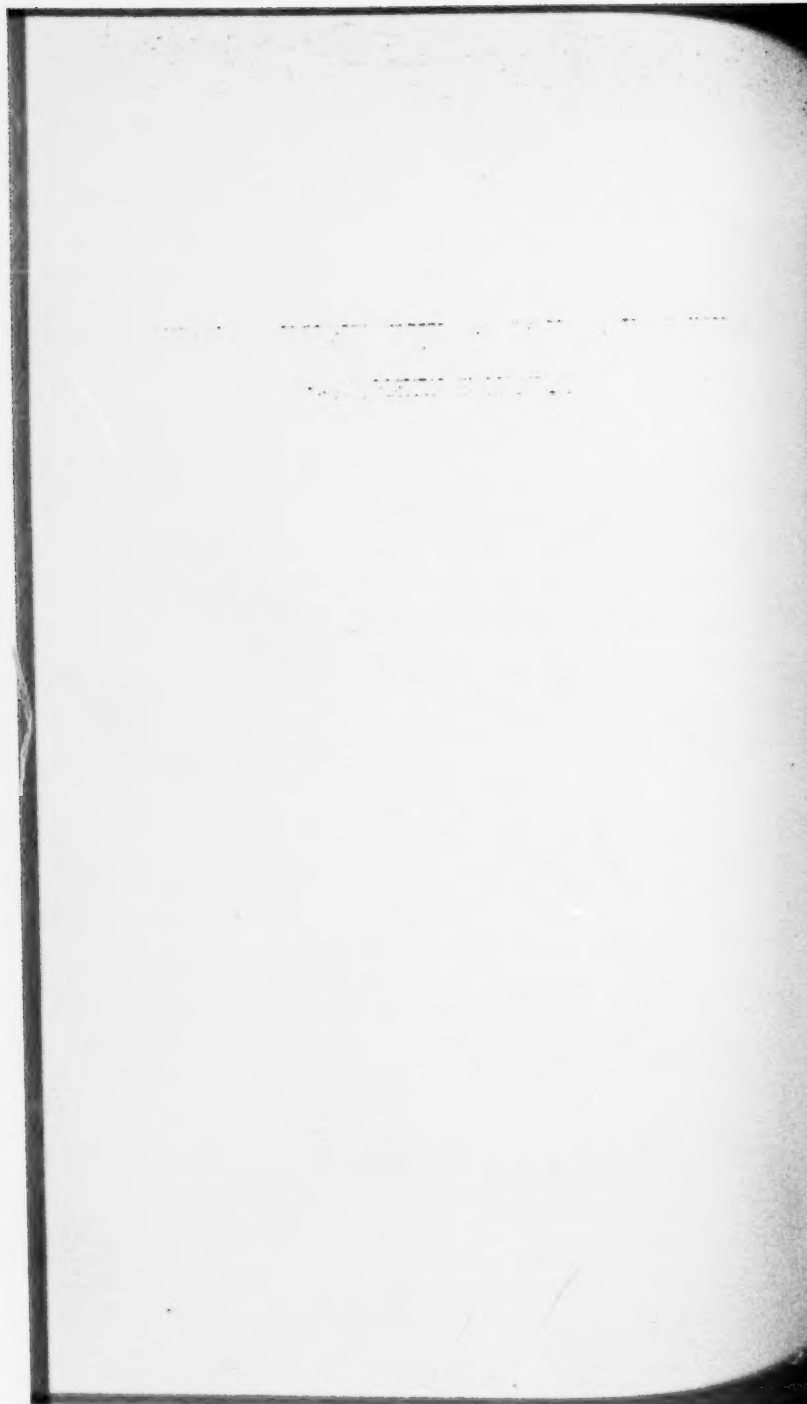
MERRILL MOORES,  
*Counsel for Appellant.*

Service of a copy of the foregoing petition is acknowledged this 17th day of April, 1924.

JOHN H. DUNBAR,  
*Attorney General of Washington.*

(2632)





FILE COPY

OCT 23 1921

WM. R. STANS

NO. 345

# In the Supreme Court of the United States

OCTOBER TERM, 1921

A. J. BUCK,

*Appellant,*

vs.

NO. 3

E. V. KUYKENDALL, Director of Public Works of the State of Washington,  
*Appellee.*

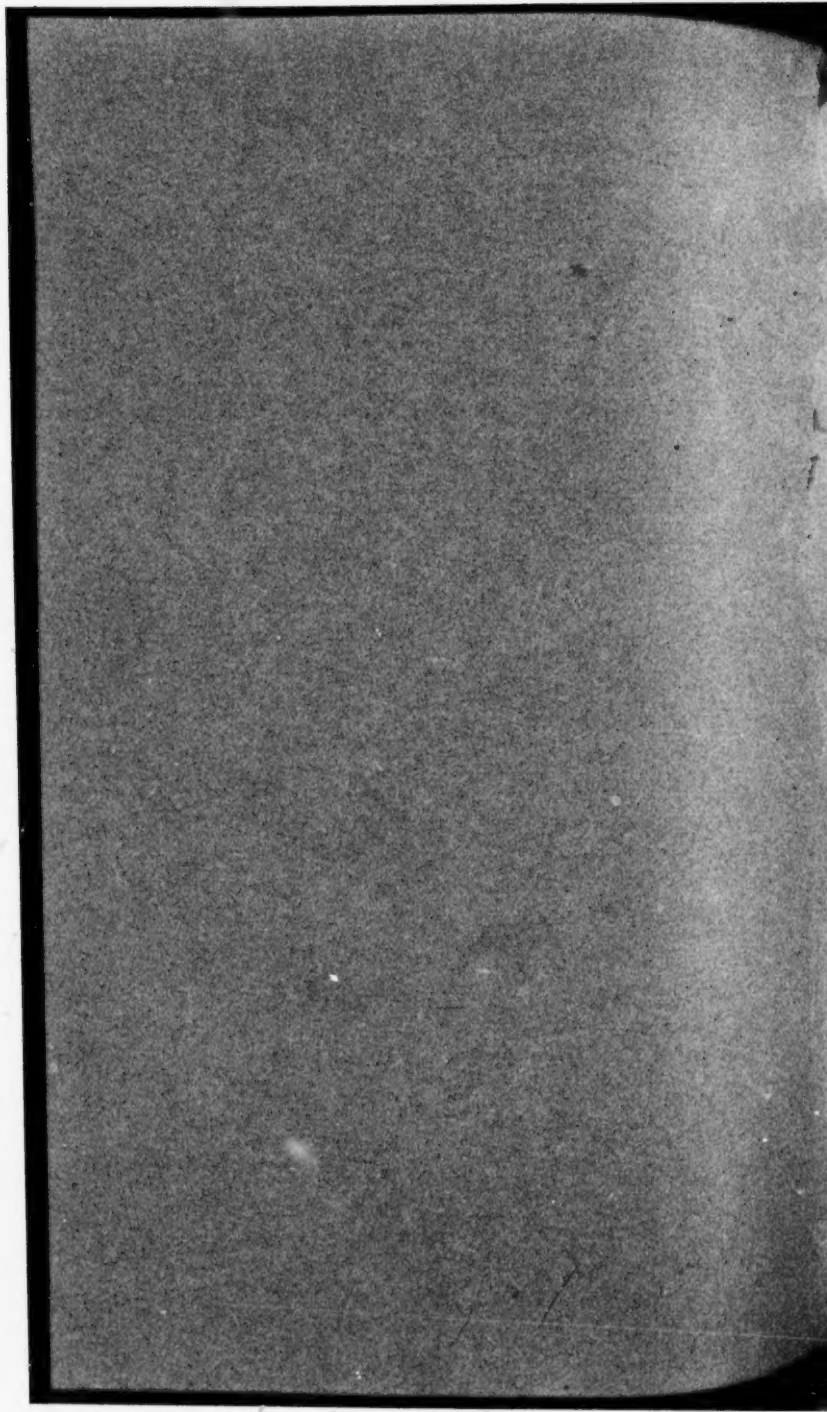
APPEAL FROM THE DISTRICT COURT OF  
THE UNITED STATES FOR THE WEST-  
ERN DISTRICT OF WASHINGTON

## Brief of Appellant

W. R. CRAWFORD,

J. MERRILL MOORES,

*Solicitors for Appellant.*



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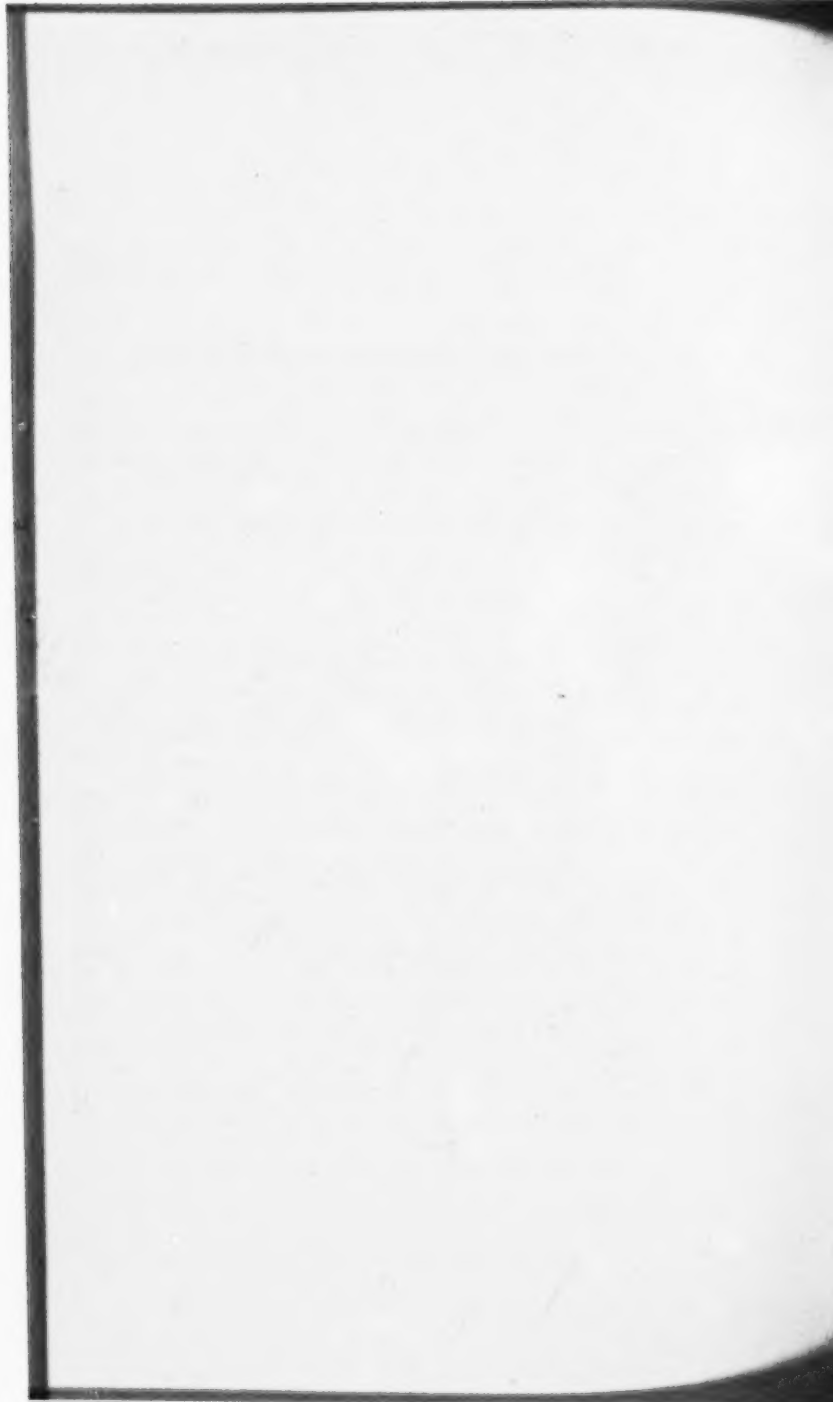
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# In the Supreme Court of the United States

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A. J. BUCK,

*Appellant,*

vs.

E. V. KUYKENDALL, Director of Public Works of the State of Washington,  
*Appellee.*

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NO. 924

APPEAL FROM THE DISTRICT COURT OF  
THE UNITED STATES FOR THE WEST-  
ERN DISTRICT OF WASHINGTON

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## STATEMENT

### I.

The amended complaint shows:

Congress duly enacted a certain "Federal Highway Act" in 1917, amended in 1921, granting finan-

cial aid to States adopting the same and the provisions thereof. The State of Washington adopted the same and its provisions in 1917 by an act of its legislature. That the said provisions prohibited tolls of any kind on such Federal aided highways; required the State to maintain the same in good repair and condition; required such highways to be of such width and strength as to take care of, not only the then traffic, but also the probable increase thereon; also required the construction or reconstruction of public highways, interstate in character, in order to take care of interstate traffic. The State had constructed and reconstructed the "Pacific Highway" between the City of Seattle and Vancouver, Washington, a distance of 194 miles, as part of a continuous highway extending from British Columbia to Mexico, and had received from the Federal Government under the provisions of the said "FEDERAL HIGHWAY ACT" more than one-fourth of the entire cost of such construction and reconstruction of said part of said "Pacific Highway," and the same has been opened and is being used for traffic.

## II.

From Vancouver, Washington, to Portland, Oregon, the said "Pacific Highway" has been constructed and reconstructed under the same "FEDERAL HIGHWAY ACT" duly adopted by the State of Oregon, and the same has been opened and is being used for traffic.

## III.

That the plaintiff had complied with all of the Motor Vehicle Laws of the State of Oregon, including the payment of license fees, and having complied with the provision of the Railroad Commission law of such State, had been granted a certificate or license to engage in the business of transporting persons for compensation in his motor vehicles on the said "Pacific Highway" from Portland, Oregon, to the Oregon boundary line as part of a continuous operation to the Cities of Tacoma and Seattle, Washington, on said "Pacific Highway," having paid all the necessary fees therefor. Plaintiff filed his time schedule and tariff showing a fare between Portland and Tacoma of \$4.60 and between Portland and Seattle of \$5.60.

## IV.

The State of Washington duly enacted in 1921 a law relating to and regulating motor vehicles of all classes in the use of public highways, including the fixing of fees, the amount of which was determined by the weight of the vehicles and whether the use was private or the carrying of passengers for compensation. A further law was enacted the same year, requiring owners and operators to take out drivers' licenses. That the plaintiff had complied with all the provisions of such laws and the amendments thereto, enacted in the year 1923, and was entitled to operate his motor vehicles carrying persons for compensation on the public highways of the State as provided for in the said laws.

## V.

The State of Washington enacted Chap. 111. of the laws of 1921, defining Auto Transportation Companies and regulating the business thereof. Sec. 4 of said law requires an auto transportation company before it can engage in business on the public highways in the State to apply for and receive a certificate or license to carry on such busi-



ness on such highways, between fixed termini in the State. Such law also provides that it does not repeal any of the laws of said State relating to motor vehicles and the owners or operators thereof. Such law was amended in 1923, fixing a charge of not more than 1 per cent of the gross revenue of such companies in order to pay for the cost of the supervision of such companies. Such law vests with the Director of Public Works of the State sole and exclusive authority to carry out the provisions of such law and make rules and regulations. That said law provides that no certificate or license can be granted in the same territory in which a holder of a certificate or license is operating; and the Director has the authority to grant or deny applications for such certificate or license within the territory not already occupied or to amend, alter or change any application, even to changing the termini or routes; further a surety bond or insurance policy must be furnished to such Director covering every motor vehicle operated, before the applicant can receive a certificate or license, so as to protect against any damage or liability arising from the operation of such motor vehicle engaging in such business. That Sec. 8 provides that neither the act nor any provi-

sion thereof shall or be construed to apply to interstate commerce, only when permitted under the provisions of the Constitution of the United States and the Acts of Congress; that Sec. 11 of said law provides that the law relating to and regulating motor vehicles, their owners and operators are not repealed or amended.

## VI.

That the Director issued four certificates to operate on the "Pacific Highway" to four corporations under such law, one between Seattle and Tacoma, another between Tacoma and Olympia, another between Olympia and Kelso, and another between Kelso, Washington, and Portland, Oregon; all of such certificates or licenses restricted the holders thereof from engaging in any business except within the above named termini of each respective certificate holder. That the Director has refused, although applications therefor have been made by divers persons, to issue any certificate or license to carry interstate commerce over said "Pacific Highway" between Seattle and Tacoma, Washington, and Portland, Oregon, and there is now no through service between said Cities and said States by motor vehicles carrying interstate passengers.

## VII.

That the aggregate fares by said four certificate holders between Seattle and Portland is \$6.85 and between Tacoma and Portland is \$5.85. The railroad fare between said respective points is \$6.58 and \$5.21 respectively. That said certificate holders operate motor busses carrying from 25 to 30 passengers and use said "Pacific Highway" for the purpose of doing business thereon, stopping thereon to take on or let off passengers. Such operation is not an inconvenience to the public or other traffic nor a hindrance on or an obstruction of said highway.

## VIII.

That for many months prior to December, 1922, there had been in operation on the "Pacific Highway" between the Cities of Seattle and Tacoma, Washington, and Portland, Oregon, a motor bus line with a daily schedule and rates of fare of \$5.50 between Tacoma and Portland, only carrying interstate passengers between said Cities and States, that such line was operated at a profit, but was compelled to cease such operation by the threats of arrest made by the Director because no certificate

or license had been granted by him, and in fact had been refused. The plaintiff, an experienced bus operator, after careful examination of the conditions in Seattle, Tacoma and Portland, made an application to the Director on the form prepared by said Director, for a certificate or license to engage in the business of carrying passengers by motor vehicles on the "Pacific Highway" between Seattle and Tacoma, Washington, and Portland, Oregon, no passenger to be taken on and discharged in the same State, the business to be wholly interstate; the motor busses to be used would not be as large nor heavy as the busses then used by said four certificate holders and no stops to be made on said highway to take on or let off passengers, but private property had been acquired along said line for such purposes; the said "Pacific Highway" not to be used for doing business thereon but solely as a thoroughfare. That plaintiff had complied with all of the laws of the State of Washington relating to and regulating motor vehicles and the owners and drivers thereof, including the payment of the necessary fees for licenses, and was authorized to use said highways by said motor vehicle laws. Further plaintiff, as required by the application, under oath

agreed to comply with all the laws relating to and regulating motor vehicles, owners and operators thereof, and the provisions of the said Chap. 111, as amended, and all the rules and regulations of said Director. That the plaintiff is and was financially able to acquire motor vehicles and engage in such interstate commerce, and to comply with all the laws of the State and the rules and regulations of the Director.

#### IX.

That the Director heard said application and denied the granting of such certificate or license, restricted as aforesaid, on the grounds that there were adequate transportation facilities between the said Cities and States by train and that the four certificates made a continuous route by motor vehicles between said Cities and States, by the passengers changing at said Cities of Tacoma, Olympia and Kelso, and that the law prohibited him from granting the same as the combined routes of said four certificate holders occupied the same territory, to wit, Seattle and Tacoma, Washington, and Portland, Oregon; and that the applicant (plaintiff) did not show that he was financially able to engage

in such business, if granted the certificate or license therefor. That the proposed operation in such interstate commerce would cause no hindrance or obstruction on said "Pacific Highway" to other traffic or to the public. The plaintiff agreed with said Director to comply with every provision of said Chap. 111, as amended, on oath, and is ready, willing and able so to do.

## X.

That the Director threatened plaintiff, his servants, agents, employees and drivers with arrest, if the plaintiff operated his motor vehicles on the "Pacific Highway" in the State of Washington, between Vancouver and Seattle, Washington, carrying passengers for compensation, from the City of Portland, Oregon, operating in Oregon under the certificate or license issued by said State of Oregon, upon the sole ground that plaintiff had not been granted a certificate or license to engage in such business under the provisions of said Chap. 111, as amended, and the plaintiff will be prevented from the exercise of and will forfeit his rights in Oregon and lose the money paid to the State of Oregon, including the license fees for his motor vehicles.

## XI.

That Sec. 4 of Chap. 111 of the Session Laws of 1921, as amended, requiring a certificate or license to engage in interstate commerce over Federal aided highways, restricting operation to one certificate holder in the same territory on a Federal aided highway, vesting sole jurisdiction in the Director to grant or refuse a certificate or license to engage in interstate commerce on the public highways of the State on occupied territory, and with power to change the termini and route of an applicant, and the acts of the defendant in denying a certificate or license to the plaintiff to engage in such interstate commerce by carrying passengers for compensation on motor vehicles on the "Pacific Highway," no passengers to be taken on and discharged in the same State, and no stops to take on or let off passengers on the public highway, under the same laws, rules and regulations regulating the said four certificate holders, take plaintiff's property without due process of law, destroy his privileges and immunities to engage in interstate commerce, not only in the State of Washington, but also in the State of Oregon, have created a monopoly on Federal aided



interstate highways, have violated the contract under which the State received Federal aid, discriminate against interstate commerce in favor of intrastate commerce on the same highways, and prohibit interstate commerce to be carried on under the same laws, rules and regulation as applied to intrastate commerce on public highways, all of which are contrary to and in contravention of the Constitution of the United States, especially the Fourteenth Amendment and Art. 1, Sec. 8 thereof, the protection of which was prayed.

## XII.

A temporary injunction was prayed enjoining the Director from interfering with the operation of the plaintiff, his servants, agents, employees and drivers while engaging in interstate commerce by carrying passengers for compensation by motor vehicles on the "Pacific Highway" between the City of Seattle and the Southern boundary line at Vancouver, Washington, but not protecting the plaintiff in the violation of any of the laws relating to and regulating motor vehicles and their operators in the State of Washington or any other provision of the said law, Chap. 111, as amended, except such

provisions relating to the obtaining of the certificate or license to engage in business with motor vehicles on public highways carrying passengers for compensation, and that upon a final hearing the temporary injunction be made permanent and further, the said provisions of said law, Chap. 111, as amended, requiring a certificate or license to engage in interstate commerce on public highways be decreed void and unconstitutional.

---

A motion to dismiss the amended complaint on the ground that the same did not state any matters of equity or facts sufficient to entitle plaintiff to any relief, was presented and granted, and the amended bill of complaint was dismissed, and upon refusal of plaintiff to plead over a decree was entered dismissing the action.

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No opinion was rendered by the Court in connection therewith.

Proper appeal was prayed and bond given.

---

Proper assignment of error was filed, which recited that the Court erred in dismissing the amended bill of complaint and in dismissing the cause.

## SPECIFICATIONS OF ERRORS.

## I.

Court erred in dismissing the amended complaint.

## II.

Court erred in dismissing the cause of action.

## III.

The decree dismissing the cause of action is erroneous in these particulars:

(a) That plaintiff's constitutional rights under the contract between the Federal Government and the State of Washington, evidenced by the "Federal Highway Act" and adoption thereof by the State, were not protected.

(b) In deciding that said Sec. 4 of said law did not create an unconstitutional monopoly on FEDERAL AID HIGHWAYS.

(c) That Sec. 4 of said State law, regarding a certificate or license as applied to plaintiff's operation, was constitutional.

(d) In deciding that Sec. 4 of said State law, and the acts of the Director thereunder, refusing a certificate or license on the ground that said law restricted the granting of more than one certificate in the same territory, which territory was Seattle, Washington, and Portland, Oregon, when there was no certificate holder operating in the same territory in the two States, were constitutional.

(e) That said Sec. 4 and the acts of said Director thereunder, were not a prohibition or burden on interstate commerce, and discriminating against interstate commerce, in favor of intra-state commerce over the same **FEDERAL AID HIGHWAYS**.

(f) That the Director, under Sec. 4 of said law, was empowered to prevent plaintiff's said operation from the State of Oregon into Washington, having complied with all of the laws of the States of Oregon and Washington, relating to and regulating motor vehicles, their owners and operators, and having a proper certificate or license from the State of Oregon.

(g) That the action of the Director in refusing to grant a certificate or license to plaintiff to engage wholly in interstate commerce on the "Pacific Highway," Federal aided, when he had complied with all laws and had applied to the Director for such certificate or license and under oath had announced that he would comply with all of the laws relating to and regulating motor vehicles, their owners and operators, and all the provisions of law, Chap. 111, as amended, and the rules and regulations of the Director, was not arbitrary but was constitutional.

(h) That the action of the Director prohibiting and preventing the engaging of interstate commerce from the State of Oregon into the State of Washington was not arbitrary and discriminating against interstate commerce, but was constitutional.

## ARGUMENT.

## I.

THE FEDERAL HIGHWAY ACT AND THE ADOPTION OF THE PROVISIONS THERE-OF BY THE STATE OF WASHINGTON CONSTITUTE A CONTRACT PROTECTED BY THE FEDERAL CONSTITUTION. THE PROVISIONS OF THE STATE LAW, CHAP. 111, OF THE LAWS OF 1921, AS AMENDED, PREVENTING UNIMPEDED TRAFFIC ON FEDERAL AIDED HIGHWAYS OR GRANTING AN EXCLUSIVE PRIVILEGE TO USE SUCH FEDERAL AIDED HIGHWAYS IN CERTAIN TRAFFIC, IMPAIR SUCH CONTRACT AND ARE UNCONSTITUTIONAL. SAID PROVISIONS CREATE A MONOPOLY, DISCRIMINATE AGAINST AND PROHIBIT THE FREE USE OF SAID FEDERAL AIDED HIGHWAYS FOR TRAFFIC.

(Rec. pp. 2, 3, 4, 5, 9, 10).

The following parts of said "Federal Highway Act", and the State law adopting the same are set out herein:

Sec. 2 (Terms used in act defined.) That, when used in this Act, unless the context indicates otherwise—

The term "Federal Aid Act" means an Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes," approved July 11, 1916, as amended by Sections 5 and 6 of an Act entitled "An Act making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1920, and for other purposes," approved Feb. 28, 1919, and all other Acts amendatory thereof or supplementary thereto.

The term "highway" includes rights of way, bridges, drainage structures, signs, guard rails, and protective structures in connection with highways, but shall not include any highway or street in a municipality having a population of two thousand five hundred or more as shown by the last available census, except that portion of any such highway or street along which within a distance of one mile the houses average more than two hundred feet apart.

The term "highway department" includes any State department, commission, board or official

having adequate powers and suitably equipped and organized to discharge to the satisfaction of the Secretary of Agriculture the duties herein required.

The term "maintenance" means the constant making of needed repairs to preserve a smooth surfaced highway.

The term "construction" means the supervising, inspecting, actual building, and all expenses incidental to the construction of a highway, except locating, surveying, mapping, and cost of right of way.

The term "reconstruction" means a widening or a rebuilding of the highway or any portion thereof to make it a continuous road, and of sufficient width and strength to care adequately for traffic needs.

Sec. 6. (Projects receiving Federal aid approval by Secretary of Agriculture.) That in approving projects to receive Federal aid under the provisions of this Act the Secretary of Agriculture shall give preference to such projects as will expedite the completion of an adequate and connected system of highways, interstate in character. \* \* \* Highways which may receive Federal aid shall be di-



vided into two classes, one which shall be known as primary or interstate highways, and shall not exceed three-sevenths of the total mileage which may receive Federal aid, and the other which shall connect or correlate therewith and be known as secondary or intercounty highways, and shall consist of the remainder of the mileage which may receive Federal aid. \* \* \*

Sec. 8. (Types of surface and kinds of materials for construction, etc., of Federal aid roads.) That only such durable types of surface and kinds of materials shall be adopted for the construction and reconstruction of any highway which is a part of the primary or interstate and secondary or intercounty systems as will adequately meet the existing and probable future traffic needs and conditions thereon. The Secretary of Agriculture shall approve the types and width of construction and reconstruction and the character of improvement, repair and maintenance in each case, consideration being given to the type and character which shall be best suited for each locality and to the probable character and extent of the future traffic.

Sec. 9. (Freedom from tolls of Federal aid roads—width of roads.) That all highways constructed or reconstructed under the provisions of this Act shall be free from tolls of all kinds.

That all highways in the primary or interstate system constructed after the passage of this Act shall have a right of way of ample width and a wearing surface of an adequate width which shall be not less than eighteen feet, unless, in the opinion of the Secretary of Agriculture, it is rendered impracticable by physical conditions, excessive costs, probable traffic requirements, or legal obstacles. \* \* \*

Sec. 11. (Surveys, plans, specifications and estimates—approval—setting aside State's share of Federal fund—public land states.) That any State having complied with the provisions of this Act, and desiring to avail itself of the benefits thereof, shall by its State highway department submit to the Secretary of Agriculture project statements setting forth proposed construction or reconstruction of any primary or interstate, or secondary or inter-county highway therein. \* \* \*

Sec. 12. (State highway department—supervision of work on Federal aid roads—approval by Secretary of Agriculture.) That the construction and reconstruction of the highways or parts of highways under the provisions of this Act, and all contracts, plans, specifications and estimates relating thereto, shall be undertaken by the State highway departments subject to the approval of the Secretary of Agriculture. The construction and reconstruction work and labor in each State shall be done in accordance with its laws and under the direct supervision of the State highway department, subject to the inspection and approval of the Secretary of Agriculture and in accordance with the rules and regulations pursuant to this Act.

Sec. 13. (Payments to State on account of construction, etc., of Federal aid roads—how and when made.) That when the Secretary of Agriculture shall find that any project approved by him has been constructed or reconstructed in compliance with said plans and specifications, he shall cause to be paid to the proper authorities of said State the amount set aside for said project. \* \* \*

Sec. 14. (Failure of State to maintain Federal aid road—duty of Secretary of Agriculture.) That should any State fail to maintain any highway within its boundaries after construction or reconstruction under the provisions of this Act, the Secretary of Agriculture shall then serve notice upon the State highway department of that fact, and if within ninety days after receipt of such notice said highway has not been placed in proper condition of maintenance, the Secretary of Agriculture shall proceed immediately to have such highway placed in proper condition of maintenance and charge the cost thereof against the Federal funds allotted to such State, and shall refuse to approve any other project in such State, except as hereinafter provided. \* \* \*

Sec. 18. (Rules and regulations by Secretary of Agriculture—recommendations.) That the Secretary of Agriculture shall prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this Act, including such recommendations to the Congress and the State highway departments as he may deem necessary for preserving and protecting the highways and insuring the safety of traffic thereon.

Sec. 1 of the law, Chap. 76 of the laws of 1917.

“The State of Washington hereby assents to the purposes, provisions, terms and conditions of the grant of money provided in an Act of Congress entitled ‘An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes,’ approved July 11, 1916.”

The offer made by the Federal Government in the “FEDERAL HIGHWAY ACT” to extend financial aid in the construction and reconstruction of primary or interstate highways and secondary or intercounty highways to States adopting the same by proper legislative act, when accepted by the State of Washington, became a contract and could not thereafter be changed, amended or abrogated by any legislative act of the State of Washington, without infringement of the Federal Constitution.

*McGehee v. Mathis*, 4 Wall. 145; 18 L. ed. 314.

The Federal Government constructed and for some years maintained a highway from Washington, D. C., through the States of Maryland, Pennsylvania, Ohio and into Indiana. The States of Maryland, Pennsylvania and Ohio enacted proper laws offering to purchase the portions of said high-

way in the respective States, which offers were duly accepted by Acts of Congress and such highway was conveyed to said respective States, subject to certain terms and conditions, one being that no tolls could be charged against owners of stage coaches carrying United States mail. The said states thereafter by legislative acts endeavored to modify and amend such condition. The Supreme Court of the United States held that the States, having entered into such contract with the Federal Government, could not amend or change the same, and such legislative acts of such States were held to violate the Constitution of the United States.

*Seabright v. Stokes et al.*, 3 How. 151,  
11 L. ed. 537.

*Neil, Moore & Co. v. Ohio*, 3 How. 720,  
11 L. ed. 800.

*Achison v. Hudleson*, 12 How. 291, 13 L.  
ed. 993.

In Sec. 2 the term "reconstruction" was defined as including the widening or rebuilding highways or any portion thereof, to make a continuous road sufficiently wide and strong to care adequately for "traffic" needs.

Sec. 8 provides that such highways must be built to adequately meet existing and probable future "traffic" needs and conditions. Further, the Secretary of Agriculture must approve the types and width, and consideration must be given probable character and extent of future "traffic."

Sec. 18 vests Secretary with sole authority to administer the law, protecting the highways and the safety of "traffic" thereon.

As such provisions of said law were enacted long subsequent to decisions of the Supreme Court of the United States, defining the term "traffic," such term had an accepted meaning and Congress used such term advisedly.

"Commerce, undoubtedly, is traffic, but it is something more; it is intercourse."

*Gibbons v. Ogden*, 9 Wheat. 1, 189; 6 L. ed. 23, 68.

Interstate commerce consists of intercourse and traffic between the citizens of different States.

Pomeroy on Const. Law, Sec. 378.

*Mobile County v. Kimball*, 102 U. S. 691,  
702; 26 L. ed. 238, 241.

*McCall v. California*, 136 U. S. 104, 108;  
34 L. ed. 391, 392.

*Addyston Pipe & Steel Co. v. U. S.*, 175  
U. S. 211, 241; 44 L. ed. 136, 142.

The term "traffic" is defined as business: Goods or persons passing or being conveyed to and from along a railroad, canal, steamboat route or the like.

Universal Dict. Eng. Language.

To traffic is to pass goods and commodities from one person to another for equivalent of goods or money.

28 Am. & Eng. Ency., p. 443.

*Levine v. State*, 34 S. W. 969, 970.

The transportation of passengers on a street railway is "traffic."

*South Covington & C. St. Ry. v. Covington*, 235 U. S., 536, 544, 59 L. ed. 350, 353.

Sec. 9 of such law provides:

"That all highways constructed or reconstructed under the provisions of this Act, shall be free from tolls of all kinds."



The term "tolls" has been defined as sums of money charged for the use of a road, bridge or the like of a public nature.

Bouvier 3283.  
Webster's Dictionary.

*Sands v. Manistec River Imp. Co.*, 123  
U. S. 288; 31 L. ed. 149.

Also it has been decided that the tax on gasoline used by motor propelled vehicles on public highways is a toll, being charged for the maintenance of such highways.

In re Ops. 120 Atl. 629.

There is set out herein the following parts of the state law, Chapter 111, of the Laws of 1921, as amended:

Section 1. (a) The term "Corporation" when used in this act means a corporation, company, association, or joint stock association.

(b) The term "person" when used in this act means an individual, a firm or a co-partnership.

(c) The term "Commission" when used in this act means the Public Service Commission of the State of Washington, or the Director of Public Works or such other

board or body as may succeed to the powers and duties now held by the Public Service Commission.

(d) The term "Auto transportation company" when used in this act means every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any motor propelled vehicle not usually operated on or over rails used in the business of transporting persons, and, or, property for compensation over any public highway in this state between fixed termini or over a regular route and not operating exclusively within the incorporated limits of any city or town: Provided, That the term "auto transportation company," as used in this act, shall not include corporations or persons, their lessees, trustees, receivers or trustees appointed by any court whatsoever, in so far as they own, control, operate or manage taxicabs, hotel busses, school busses, motor propelled vehicles, operated exclusively in transporting agricultural, horticultural, or dairy or other farm products from the point of production to the market, or any other carrier which does not come within the term "auto transportation company" as herein defined.

Sec. 4. No auto transportation company shall hereafter operate for the transportation of persons and, or, property for compensation between fixed termini or over a regular route in this state, without first having obtained

from the Commission under the provisions of this act a certificate declaring that public convenience and necessity require such operation; but a certificate shall be granted when it appears to the satisfaction of the Commission that such person, firm or corporation was actually operating in good faith, over the route for which such certificate shall be sought on January 15th, 1921. Any right, privilege, certificate held, owned or obtained by an auto transportation company may be sold, assigned, leased, transferred or inherited as other property, only upon authorization by the Commission. The Commission shall have power, after hearing, when the applicant requests a certificate to operate in a territory already served by a certificate holder under this act, only when the existing auto transportation company or companies serving such territory will not provide the same to the satisfaction of the Commission, and in all other cases with or without hearing, to issue said certificate as prayed for; or for good cause shown to refuse to issue same, or to issue it for the partial exercise only of said privilege sought, and may attach to the exercise of the rights granted by said certificate such terms and conditions as, in its judgment, the public convenience and necessity may require.

Sec. 7. Every officer, agent or employee of any corporation, and every other person who violates or fails to comply with, or who procures, aids or abets in the violation of any provisions of this act, or who fails to obey, observe or comply with any order, decision,

rule or regulation, direction, demand or requirement, or any part of provision thereof, is guilty of a gross misdemeanor and punishable as such.

Sec. 8. Neither this act nor any provision thereof shall apply or be construed to apply to commerce with foreign nations or commerce among the several states of this Union except in so far as the same may be permitted under the provisions of the Constitution of the United States and the Acts of Congress.

Sec. 11. This act shall not repeal any of the existing law or laws, relating to motor propelled vehicles, their owners or operators, or requiring compliance with any condition for their operation.

Introduced into the House February 8, 1921.

Passed the Senate, March 7, 1921.

Approved by the Governor, March 17, 1921.

The term "traffic" is not one of restriction, but embraces all kind or character of use of such public highways by any means or instrument of transportation, whether or not there is a charge, for the use of the means or instruments by the owner thereof, to others for transportation.

The provision of Section 9, relating to such highways and prohibiting the exaction of tolls of all kinds for the use thereof, places an additional safeguard upon the rights to the free use of such highways by "traffic."

If Section 4 of the State law, set out above, prohibiting the use of such public highways, protected by the "Federal Highway Act," except to one person or corporation in the same territory using such highway, in order to transport persons, or property, thereon by motor vehicles is constitutional, then the State can prohibit the free use of such highways by any class either of motor vehicles or of persons, and the entire meaning of the Federal Highway Act and the protection thereof can be destroyed and a favored few would have absolute monopoly in "traffic" thereon.

Fortunately we have decisions by your Honorable Court which foreclose any argument even, that the term "free from tolls," grants a free use and passage on public highways for all. Such decisions were rendered long prior to the enacting by Congress of the "Federal Highway Act" and the adoption thereof by the State of Washington, and

such decisions were incorporated in and became a part of such Congressional and State legislations.

The first cases arose under the contracts referred to herein-above, by the Federal Government and the State of Maryland, Pennsylvania and Ohio, in which the Federal Government was protected against tolls exacted against contractors hauling United States mail by stage coaches, as the contracts protected United States mail. Such contracts, however, did permit the exaction of tolls on all other users of such highways.

Section 9 prohibits tolls of all kinds to be levied for any trafficker on all such constructed or reconstructed public highways.

*Seabright v. Stokes et al*, 3 How. 151;  
11 L. ed. 537.

*Neil, Moore & Co. v. Ohio*, 3 How. 720;  
11 L. ed. 800.

*Achison v. Hudleson*, 12 How. 291; 13  
L. ed. 993.

In another case the provisions of land grants donating lands to railroad companies providing the use thereof by the Government should be free from tolls or other charges, were interpreted and

it was held that the term "free from tolls or other charges" meant the unrestricted use of such railroads, but not the equipment thereon. In delivering the opinion of the court Mr. Justice Bradley said:

"In view of the legislative history and practice referred to, it seems impossible to resist the conclusion, when we meet with a legislative declaration to the effect that a particular railroad shall be a public highway, that the meaning is, that it shall be open to the use of the public with their own vehicles; . . . . And when this right of the use of the road is granted "free from all tolls or other charge for transportation of any property or troops of the United States," it only means, that the Government shall not be subject to any tolls for the use of such road."

*Lake Superior etc. R. R. Co. v. United States*, 93 U. S. 442; 23 L. ed. 965, 970.

Said case was cited with approval.

*U. S. v. Union Pacific Ry. Co.*, 249 U. S. 354; 63 L. ed. 643.

In another case the construction of certain provisions of a charter of a canal company, granted by Maryland and Delaware, was before this Court for

decision. In such case it was insisted by the Canal Company that the provisions declaring the canal and the works, to be erected thereon when completed, be held a public highway, free for the transportation of all goods, commodities or produce whatsoever on payment of the toll imposed by the act, prohibited the free passage of boats or passengers except upon payment of tolls. In the opinion of the Court delivered by Mr. Chief Justice Taney it was said:

“The error consists in treating words, which were intended as a limitation of the powers of the corporation, as a restriction upon the rights of the public. In the opinion of the Court, the words in question were intended to guard against the exaction of other or higher tolls than those given by law, and not to restrict the rights of passage. \* \* \* They were not intended to restrict the provision immediately preceding, that the canal should be a highway, but more effectually to secure the right of the public by restricting the toll to be demanded to the toll imposed by the act.”

*Perrine v. The Chesapeake & Delaware Canal Co.*, 9 How. 172, 187; 13 L. ed. 92, 98.

It is admitted that the provisions of Sec. 4 of said State law prohibit the use of “Federal Aided



Highways" except to one person or corporation within the same territory. The contract with the Federal Government and the provisions of the "Federal Highway Act" have been impaired, destroyed and held for naught. Said provision of said Sec. 4 is absolutely void and unconstitutional.

*State ex rel. United Auto T. Co. v. Dept.  
Pub. Wks., 119 Wash. 381.*

In Sec. 2 of said "Federal Highway Act" it is provided: "That, when used in this Act, unless the context indicates otherwise." The term "Highway" includes, etc., but does not include any highway or street in a municipality with a population of 2500 or more, except that portion thereof along which within a distance of one mile the houses average more than 200 feet apart.

It has been claimed that such definition prohibits the use by "traffic" under the provisions of said "Federal Highway Act," not only within such excepted part of a highway or street in a municipality, but also all other portions of a Federal Aided Highway. So that all the portions of the "Pacific Highway," interstate in character, are not within the protection of the said "Federal

Highway Act" by reason of the fact that the cities of Seattle, Tacoma, Chehalis, Centralia and Vancouver must be traversed in order to reach the State of Oregon. Such construction of such term of said Sec. 2 would not only be farcical, but would be contrary to the plain provisions of the said "Federal Highway Act" and do violence to the intention of Congress.

All the provisions of said "Federal Highway Act" show that the State alone was to receive financial aid and not municipalities which improve their streets by assessments upon the property abutting thereon.

The above cited definition of the term "Highway" in Sec. 2 referred to and covered only the expenditure of Federal moneys, and in no way restricts the use of all highways in the State any portion of which has received Federal aid. That such is the interpretation of the term "Highway" is seen by the following portions of said Act, in the definition of the term "reconstruction" providing for the making of a continuous road, in Sec. 6 an adequate and connected system of highways, not only interstate in character, but also

inter-county, Sec. 9 providing that all highways constructed or reconstructed shall be free from tolls of all kinds. The context of the provisions of said "Act" plainly indicate that the said restricted definition of the term "Highway" in Sec. 2 does not apply to the use by "traffic" and its rights to use all highways in the State of Washington, any part of which has been constructed or reconstructed under the provisions of said law.

Again, any person who operates exclusively on the streets of an incorporated city or town does not come within the provisions of the definition of the term "Auto Transportation Company" as defined in Sec. 1 of said Chap. 111, but does come within such definition if he uses the public highways outside the incorporated limits of such city or town. In other words, the State has not attempted by said law to regulate operations within cities or towns. So that as far as an operation between Seattle and Oregon is concerned, if the "Trafficker" is protected by the "Federal Highway Act," outside of incorporated cities or towns, he is also protected against the "Auto Transportation Company" law, within such cities and towns.

The Supreme Court of the State of Washington has interpreted the provisions of the "Motor Vehicle Act" and the "Auto Transportation Act" and decided that the Motor Vehicle Act was in no way repealed by the Auto Transportation Act, and that any person having complied with the Motor Vehicle Act has the right to use all of the public highways of the State for the doing of business thereon, except as the same may be prohibited by the provision of said Chap. 111, as amended.

In other words a "Trafficker" can use any Federal Aided Highway complying with the said Motor Vehicle Act, Chap. 96 of the Laws of 1921, as amended, protected by the provisions of the "Federal Highway Act," against the provisions of Sec. 4, at least, of said Chap. 111, as amended.

*Carlsen v. Cooney*, 123 Wash., 441.

In conclusion, we submit that the provisions of Sec. 4 of the State law, Chap. III, as amended, are void and unconstitutional, impairing the contract with the Federal Government and the provisions of the "Federal Highway Act," insuring unimpeded, unhindered and free passage for "traf-

fic" on any part or portion of any Federal Aided Highway, including extensions of such highway within any limits of any municipality.

## II.

THE PROVISIONS OF THE LAW, CHAP. 111, LAWS OF 1921, AS AMENDED, REQUIRING A CERTIFICATE OR LICENSE TO ENGAGE IN INTERSTATE COMMERCE, IS UNCONSTITUTIONAL. (Rec. pp. 4 to 11 inclusive.)

"Commerce" as used in the United States Constitution, Article 1, Sec. 8, Clause 3, includes the fact of intercourse and of traffic and the subject matter of intercourse and traffic. The fact of intercourse and traffic embraces all the means, instruments, and places by and in which intercourse and traffic are carried on, and comprehends the act of carrying them on at these places by and with these means. The subject matter of intercourse and traffic may be either things, goods, chattels, merchandise or persons.

*McCall v. California*, 136 U. S. 104; 34 L. ed. 391.

*Gloucester Ferry Co. v. Penn.*, 114 U. S. 196; 29 L. ed. 158.

*Crandell v. Nevada*, 6 Wall. 35; 18 L. ed. 745.

*Welton v. Missouri*, 91 U. S. 275; 23 L. ed. 374.

*Hall v. DeCuir*, 95 U. S. 485; 24 L. ed. 547.

*Chicago & N. W. R. Co. v. Fuller*, 17 Wall. 560; 21 L. ed. 710.

Congress, being empowered by the Constitution to regulate commerce among the several States, and to pass all laws necessary or proper for carrying into execution any of the powers specifically conferred, may make use of any appropriate means for this end. In consequence of this power Congress enacted the "FEDERAL HIGHWAY ACT" and donated financial aid in order to more satisfactorily regulate commerce between the States, by constructing public highways, interstate in character.

*Luxton v. North River Bridge Co.*, 153 U. S. 525; 38 L. ed. 808.

*Dayton-Goose Creek R. Co. v. U. S.*, Vol. 6 and 7, Adv. Opinions 216.

A State law requiring the obtaining of a license to engage in interstate commerce in the State is unconstitutional and can not be defended as a police measure. The following leading cases upon such principle, established by decision after decision by this Honorable Court, are cited. In the following case the State, not only required a license to do interstate express business in the State, but also conditioned the privilege to do such business upon a sufficient showing of financial ability to engage therein. In delivering the opinion of your Court, Mr. Justice Bradley said:

“The law of Kentucky, which is brought in question by the case, requires from the agent of every express company not incorporated by the laws of Kentucky a license from the auditor of public accounts, before he can carry on any business for said company in the State. This, of course, embraces interstate business as well as business confined wholly within the State. It is a prohibition against the carrying on of such business without a compliance with the state law. And not only is a license required to be obtained by the agent, but a statement must be made and filed in the auditor's office showing that the company is possessed of an actual capital of \$150,000.00, either in cash or in safe investments, exclusive of stock notes. If the subject is one which apper-

tained to the jurisdiction of the State Legislature, it may be that the requirements and conditions within the State would be promotive of the public good. It is clear, however, that it would be a regulation of interstate commerce in its application to corporations or associations engaged in that business; and that is a subject which belongs to the jurisdiction of the National and not the State Legislature. . . . To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; . . . We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. *Pickard v. Pullman Southern Car Co.* 117 U. S. 34 (29; 785); *Robbins v. Shelby County Taring Dist.* 120 U. S. 489 (30; 694); *Leloup v. Port of Mobile*, 127 U. S. 640 (32; 311); *Asher v. Texas*, 128 U. S. 129 (32; 368); *Stoutenburgh v. Hennick*, 129 U. S. 141 (32; 637); *McCall v. California*, 136 U. S. 104 (34; 392); *Norfolk and W. R. Co. v. Pennsylvania* Id. 114 (394). . . . We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different States), does also some local business by carrying goods from one point to another within the State of Kentucky. This is probably quite as much



for the accommodation of the people of that State as for the advantage of the company. But whether so or not, it does not obviate the objection that the regulation as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon that commerce, whether intended as such or not they operate as such."

*Crutcher v. Kentucky*, 141 U. S. 47, 56, 57, 58, 59; 35 L. ed. 649, 652, 653.

In an action where the constitutionality of an ordinance of a city was in issue involving a license, the ordinance was declared unconstitutional under the commerce clause as effecting interstate commerce by putting a burden thereon. The defense was that the city under the police power had authority to place a tax on the doing of such interstate commerce. After citing and commenting on many cases involving the power of States and Cities to exact licenses as being regulations of commerce, Mr. Justice Brewer in delivering the opinion of the Court said:

"It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly effecting the

business, but is a direct charge and burden upon that business; and if a State may lawfully exact it it may increase the amount of exaction until all interstate commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the State is enabled to say that it shall not be carried on in this way, and to that extent to regulate it."

Again, in commenting on the case of *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489 (50: 694), in which the constitutionality of a license law of Tennessee was involved, we find the following in the opinion,

"The statute made no discrimination between those who represented business houses out of the state and those representing like houses within the state. There was, therefore, no element of discrimination in the case, but, nevertheless, the conviction was set aside by this Court on the ground that whatever the state might see fit to enact with reference to a license tax upon those who acted as drummers for houses within the state, it could not impose upon those who acted as drummers for business houses outside of the state (and who were, therefore, engaged in interstate commerce) any burden by way of a license tax."

*Brennan v. Titusville*, 153 U. S. 289, 303, 304; 38 L. ed. 719, 723, 724.

In the instant case, there is no question of police power as the appellant has complied with all the requirements of all laws excepting the provisions of Chapter 111, as amended, requiring a certificate or license, and offered to comply with them.

In a case involving a ferry between Canada and the United States the Supreme Court of the United States held that an ordinance requiring the taking out a license in order to carry on the business of interstate commerce was unconstitutional and Mr. Justice Hughes in delivering the opinion said:

“The fundamental principle involved has been applied by this Court in a great variety of circumstances and it must be taken firmly established that one otherwise enjoying full capacity for the purpose can not be compelled to take out a local license for the mere purpose of carrying on interstate or foreign commerce.” (Citing in support thereof a large number of cases.)

*Sault Ste. Marie v. International Transit Co.*, 234 U. S. 335, 341; 58 L. ed. 1337, 1341.

A State under police power, can not justify interference with interstate commerce or impede

interstate traffic or impair the usefulness of its facilities for such traffic.

*Kansas S. R. Co. v. Kaw Valley Drainage Dist.*, 233 U. S. 75; 58 L. ed. 857.

We call the Court's attention to the following cases, showing that the commerce clause protects the use of streets of municipalities by wagons and automobiles as instruments of interstate commerce, against the enforcement of licenses on such vehicles or the business carried on thereon.

A municipality can not require an express company to obtain a license as a condition of transacting interstate commerce on its streets. The company was using express wagons on the streets of New York to deliver packages which had been sent from points outside the State and also to collect packages to be sent outside the State. Mr. Justice Hughes in the opinion of the Court said:

"The right of public control, in requiring such a license, is asserted by virtue of the character of the employment; but while such a requirement may be proper in the case of local or intra-state business, it can not be

justified as a prerequisite to the conduct of the business that is inter-state."

*Barrett v. New York*, 232 U. S. 14, 32;  
58 L. ed. 483, 491.

The ordinance was defended as constitutional under the police power of the State, but it was held that the police power did not justify the imposition of a direct burden upon interstate commerce and it must be confined to matters which are appropriately of local concern. Local police regulation can not go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege, and prohibit its exercise in the absence of a local license. The complainant was held to be entitled to an injunction restraining the enforcement of the ordinance in protection of its interstate business as well as the wagons and drivers while engaged in such interstate business.

In the above case the license required was necessary in order to use the public highways in New York with wagons to carry on interstate commerce. The ordinance also provided that licenses were required of the drivers and the wagons used must be numbered and bonds in the sum of \$100.00 each

on each wagon to protect the property carried. All of such provisions were declared unconstitutional as applied to interstate commerce. The appellant has paid the license fees and his drivers have paid their license fees and the operation of the appellant is interstate. If the express company, its wagons and drivers were entitled to protection by injunction against the enforcement of such ordinance, then this appellant, his vehicles and drivers are entitled to protection against the provisions of the State law.

It has been decided that a city had no constitutional right to prevent deliveries on the streets of the cities of commodities brought in from another State.

*Wagner v. Covington*, 251 U. S. 95; 64 L. ed. 157.

Where a person had moved his business across the river into another State in order to deliver liquor in wagons and other vehicles across such river in order to evade the liquor law in the place of his residence, the Court held that such transaction was interstate commerce and such business and the instruments thereof, to-wit, wagons and

teams, were protected by the commerce clause of the Constitution and the fact that he located across the river and his reprehensible past and the purpose to avoid the statute of the State, suffice to change the nature of the transactions. "Otherwise one of two persons located side by side in the same State, and doing the same business in identical ways might be engaged in interstate commerce while the other would not."

*Kirmeyer v. Kansas*, 236 U. S. 568; 59 L. ed. 721.

The above decision does not substantiate the position of the lower Court, in speaking on interstate commerce: "If one concern can establish a terminal across the State line and operate over the highways in this State without regulation, it is reasonable to presume that others will do likewise," etc. (Rec. p. 30). The lower Court, as is shown by its opinions (Rec. pp. 25 to 31 inc., 34 to 39 inc.), has consistently confused the Motor Vehicle law, Chap. 96 of the Session laws of 1921, as amended (Rec. pp. 18, 19), and Chap. 108 Session laws of 1921, as amended (Rec. p. 19), which laws contain within themselves every regulation in regard to motor propelled vehicles, their owners and driv-

ers in the use of the public highways of the State, with the Auto Transportation law, Chapter 111 (Rec. pp. 19, 20), which only relates to auto transportation companies and in no respect regulates the use of public highways, in so far as the comfort, convenience, welfare and safety of the public and the use by the public of such highways.

*Carlsen v. Cooney*, 123 Wash. 441.

### III.

THAT THE PROVISIONS OF SAID LAW, CHAP. 111, RESTRICTING THE RIGHT OF ENGAGING IN BUSINESS ON THE PUBLIC HIGHWAYS TO ONE PERSON OR CORPORATION IN THE SAME TERRITORY, APPLIED TO INTERSTATE COMMERCE ARE UNCONSTITUTIONAL AND VOID.

(Rec. pp. 20, 21.)

(1) Such provisions of said law have created a monopoly of interstate commerce on Federal Aided Highways, by granting an exclusive privilege to use such highways for such commerce.



Sec. 4 of said law provides that a certificate is granted as of right to engage in the business transporting passengers or property on public highways for compensation to any person who was engaged in such business on or prior to January 15, 1921, and further that no certificate or license could be granted to operate in the same territory occupied by a certificate holder. The record herein shows that no person desiring to engage in interstate commerce between Seattle, Washington, and Portland, Oregon, on public highways can do so, by reason of the provisions of said law, and the acts of the appellee thereunder.

A State law granting an exclusive privilege to engage in the business of interstate commerce over the public highways is unconstitutional.

*Gibbons v. Ogden*, 9 Wheat. 1; 6 L. ed. 25.

*Long v. Miller*, 262 Fed. 363 (CCA).

The above proposition is elementary and we will only cite two cases that deal exclusively with monopolies in interstate commerce on Federal Aided Highways. In one case delivering the opinion of the Court, Mr. Chief Justice Waite said:

"Since the case of *Gibbons v. Ogden*, 9 Wheat., 1, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post offices and post roads are established to facilitate the transmission of the intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the National Government. . . . The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. . . . They extend from a horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroads, and from the railroads to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right but the duty of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation. . . . The State of Florida has attempted to confer upon a single corporation the exclusive right

of transmitting intelligence by telegraph over a certain portion of its territory. . . . The legislation of Florida, if sustained, excludes all commercial intercourse by telegraph between the citizens of the other States and those residing upon this territory, except by the employment of this corporation. The United States can not communicate with their own officers by telegraph, except in the same way. The State, therefore, has attempted to regulate commercial intercourse between its citizens and those of other States, and to control the transmission of all telegraphic correspondence within its own jurisdiction."

*Pensacola Tel. Co. v. West. Union Tel. Co.*, 96 U. S. 1; 24 L. ed. 708, 710, 711.

Again, we find the following in the opinion delivered by Mr. Justice Harlan:

"Certainly, it could never be held that a due regard to the rights of either the railroad company or of any corporation claiming under it required that the Government, charged by the Constitution with the duty of regulating interstate commerce, should permit the railroad company receiving National Aid to invest a corporation, not deriving its authority from the United States, with the exclusive right to enjoy its roadway—a National roadway—for purposes of telegraphic communication between the States. Even if the act of July 24, 1866, had never been passed we ought not to construe the Idaho act as permitting the railway company to

bind itself by agreement to give to one telegraph company a monopoly of the use of its roadway for telegraphic purposes. In none of the acts of Congress, having for their object the establishing of communication by railroad and telegraph between the Missouri River and the Pacific Ocean, is there to be found anything indicating a purpose to allow the post roads of the United States, particularly those aided by the Government, to fall, for all the purpose of telegraphic communication, under the exclusive control of one or more telegraphic corporations."

*United States v. Union Pacific R. Co.*,  
160 U. S. 1, 43; 40 L. ed. 319, 334.

(2) The said provisions of said law and the acts of the Director thereunder, restricting the use of the "Pacific Highway" for interstate commerce between Seattle, Washington, and Portland, Oregon, to said four corporations holding certificates or licenses to operate wholly in intra-state commerce confined between their respective termini, discriminate, burden and prohibit interstate commerce between said cities and said States on said "Pacific Highway." In addition to the cases cited, *supra*, we call the Court's attention to a case where a State, by a legislative act, discriminated against interstate commerce in favor of intra-state

commerce in the use of public highways. It was shown in such case, as it is in the instant case, that the public highways would not be in any way injured, impaired or obstructed by the attempted interstate commerce. The statute was declared unconstitutional and in the opinion of the Court delivered by Mr. Justice McKenna, it was said:

“At this late day it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of a state, and that it can not be regulated or restrained by a state, or that a state cannot exclude from its limits a corporation engaged in such commerce. . . .

The situation is not underestimated by appellant and he says: ‘If the appellees had the right of way they might engage in interstate commerce, but their desire to engage in interstate commerce is a different thing from the means open to them to procure a right of way.’ And it is further said, that ‘the confusion of the right to engage in interstate commerce with the power to forcibly secure a right of way is the basis of appellees’ case.’

There is here and there a suggestion that the state not having granted such right the alternative is a grant of it by Congress. But this overlooks the affirmative force of the interstate commerce clause of the Constitution. The inaction of Congress is a declaration of freedom from state interference with

the transportation of articles of legitimate interstate commerce and this has been the answer of the Court to contentions like those made in the case at bar. . . .

“We place our decision on the character and purpose of the Oklahoma statute. The State, as we have seen, grants the use of the highways to domestic corporations engaged in intra-state transportation of natural gas, giving such corporations even the right to the longitudinal use of the highway. It denies to appellees the lesser right to pass under them or over them, notwithstanding it is conceded in the pleadings that the greater use given to domestic corporations is no obstruction to them. This discrimination is beyond the power of the state to make. As said by the Circuit Court of Appeals in the 8th circuit, no state can by action or inaction prevent, unreasonably burden, discriminate against, or directly regulate, interstate commerce or the right to carry it on. And in all of these inhibited particulars the statute of Oklahoma offends.

“And, we repeat again, there is no question in the case of the regulating power over the natural gas within its borders.”

*West v. Kansas Natural Gas Co.*, 221 U. S., 229, 261, 262; 55 L. ed. 716, 728, 729.

The above provisions of said State law also vests the Director with jurisdiction to grant or deny a

certificate, or license, or to annex any conditions he may desire, to forcing the doing of intra-state business by the applicant, when the only character of business desired was interstate, therefore such provisions of said law are unconstitutional as lodging the power in the director to couple the carrying out of interstate commerce by conditions and thereby making a direct burden thereon.

*St. Clair County v. Interstate Etc. Co.,*  
192 U. S. 454; 48 L. ed. 519.

#### IV.

THE SAID PROVISIONS OF SAID LAW, CHAP. 111, AND THE ACTS OF THE APPELLEE THEREUNDER, IN PROHIBITING INTERSTATE COMMERCE TO ENTER THE STATE OF WASHINGTON, BY MOTOR VEHICLES CARRYING PASSENGERS FOR COMPENSATION, ARE ARBITRARY, VOID AND UNCONSTITUTIONAL.

(Rec. p. s. 22, 23, 24.)

The record shows that the Appellant had been granted the right by the State of Oregon to use the

"Pacific Highway" in the State by motor-propelled vehicles carrying passengers for compensation, from Portland, as a part of a continuous operation to the Cities of Tacoma and Seattle, Washington. Such passengers entering such vehicles at Portland to be delivered to such Cities in Washington; that Appellant had applied for and received from the State of Washington all necessary licenses entitling his said motor vehicles to use all the public highways of said State and had complied with all the laws of the State of Washington, relating to and regulating motor vehicles, the owners and drivers thereof; that the Appellant had filed his schedule of rates between Portland, Oregon, and Tacoma and Seattle, Washington, which rates were about 15 per cent less than the local fares charged by said four certificate holders and the said railroad fares between said points in said States; that the said Appellant was not permitted but was prohibited from entering said State of Washington, carrying persons from Portland, Oregon, at such reduced fares.

It is claimed that the provisions of said Chap. 111, requiring a certificate or license to enter the State by motor vehicles carrying passengers for



compensation over the Pacific Highway, a Federal aided Highway, are valid and constitutional, on the ground that Congress has not legislated on such subject. In the first place, we contend that the "Federal Highway Act," and the provisions thereof, furnish a full and complete answer to such contention; second, that section 8 of the "Auto Transportation Law," providing that the State must have permission by the Constitution or Acts of Congress before it can bring Interstate Commerce within the provisions of said law and no permission has been granted in our view of the case by either the constitution or an Act of Congress.

We have heretofore set out in our argument our position on the "Federal Highway Act."

Said section 8 is a restriction of the provisions of such law and is not a grant of power under the same. That such is the fact, is shown, as the provisions of said law only relate to the carrying on of the business and not the use of the public highways by motor vehicles, their owners and drivers, so that unless the Constitution is amended so as to give power to regulate interstate commerce, then the

State official, namely the Appellee, has no authority to include interstate commerce within his regulatory powers.

Even if the Court could conclude that the "Federal Highway Act" had no application as a protection against said provisions of said Sec. 4 of said law or the acts of the Appellee thereunder, yet the inaction of Congress is equivalent to a declaration that such interstate commerce shall remain free and untrammelled.

In one of the leading cases on the question of commerce among States it was held, that such Court had never consciously held otherwise than that, a Statute of a State, intended to regulate or to tax, or to impose any other restriction upon the transmission of persons, or property or telegraphic messages, from one State to another, is not within that class legislation which the States may enact in the absence of legislation by Congress; and that such Statutes are void even as to that part of such transmission which may be within the State. It was also held that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from

the restraint that the States might choose to impose upon it and that the commerce clause was intended to secure.

*Wabash St. & P. R. Co. v. Illinois*, 118 U. S. 557; 30 L. ed. 244.

The attempt of a Municipality to regulate the interstate business of a street railway company is not justified by the absence of Federal Regulation.

*South Covington & C. St. R. Co. v. Covington*, 235 U. S. 538; 59 L. ed. 350.

The power vested in Congress to regulate commerce among the States cannot be stopped at the boundary line of the State, and the absence of a law by Congress is equivalent to its declaration that the importation of the article of commerce into the States shall be unrestricted. A State law prohibiting the importation of an article of trade between one State and another is a regulation of commerce between the States and void.

*Leisy v. Hardin*, 135 U. S. 100; 34 L. ed. 128.

A State cannot exclude, directly or indirectly, the subjects of interstate commerce, or, by the im-

position of burdens thereon, regulate such commerce, without Congressional permission.

*Lyng v. Michigan*, 135 U. S. 161; 34 L. ed. 150.

The inaction of Congress in prescribing rules covering transportation of any article of commerce from one State into another is equivalent to its declaration that such commerce shall be free from any State interference. The main object of commerce among the States under the Constitution of the United States, would be defeated by discriminating legislation of a State.

*Welton v. Missouri*, 91 U. S. 275; 23 L. ed. 347.

There can be no question that the transportation of persons from the State of Oregon into the State of Washington is interstate commerce and National in character and rules regulating the same should be uniform affecting all the States alike and in such regard the power of Congress is exclusive, and State regulations are prohibited.

*Gloucester Ferry Co. v. Penn., supra.*

No state has power to make any law or regulation which will affect the free and unrestrained

intercourse and trade between the States, and so long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that commerce shall be free and untrammelled; and any regulation of the subject by the States is repugnant to such freedom.

*Brown v. Houston*, 114 U. S. 622; 29 L. ed. 257.

To the same effect,

*Walling v. Michigan*, 116 U. S. 446; 29 L. ed. 691.

To the same effect,

*Vance v. Vandercook Co.*, 170 U. S. 457; 42 L. ed. 1105.

A State law regulating the business of carriers of passengers is unconstitutional as far as it burdens interstate commerce or interferes with its freedom thereby in encroaching upon the exclusive power of Congress.

*Hall v. De Cuir*, *supra*.

## V.

THAT THE ACTS OF THE SAID DIRECTOR HAVE OBSTRUCTED, HINDERED, IMPAIRED, DISCRIMINATED, AND PROHIBITED INTERSTATE COMMERCE ON FEDERAL AIDED HIGHWAYS AND WERE ARBITRARY, VOID AND UNCONSTITUTIONAL.

(Rec. pp. 1 to 11, inc.)

The record shows that there had been a continuous operation of a stage line between Seattle and Tacoma, Washington, and Portland, Oregon, for many months, up to December, 1922, engaging wholly in interstate commerce, and that the Appellee, by threats of arrest, had prohibited further operation of such line on the ground that he had not issued a certificate or license to such line; in consequence of such action of the Appellee, the Appellant was obliged to and did make an application, as directed by the Appellee, on a form prepared by him, for a certificate or license to engage in such interstate commerce between the Cities of Seattle and Tacoma, and the Southern Boundary line of the

State at Vancouver; the Appellee, after having required Appellant to apply for such certificate or license, denied such certificate or license, and the Appellee based his refusal upon the sole ground that he found there was no necessity of additional means of transportation from the State of Washington into the State of Oregon or from the State of Oregon into the State of Washington, in other words the Appellee set himself up as a power to decide whether or not interstate commerce between said States could or could not be prohibited, and then prevented such interstate commerce from entering the State of Washington. It does not seem open to argument that said actions of the appellee, as shown by the record, were not arbitrary and unreasonable, as a burden on and prohibition of interstate commerce and have taken the property of appellant without due process of law.

Authorities cited in Pars. 1, 2, 3 and 4.

## VI.

THE ACTION OF THE LOWER COURT  
DISMISSING THE AMENDED BILL OF  
COMPLAINT IS ERRONEOUS.

(Rec. pp. 13, 34 to 39, inc.)

The record shows that the lower Court had permitted an amendment to the original bill setting up additional matters showing that the actions of the Appellee were arbitrary, discriminatory and imposed burden on and prohibited interstate commerce. Appellant applied for an interlocutory injunction upon such amended complaint and Appellee thereupon filed an affidavit denying such said allegations in said amended complaint. The Court, composed of three judges, denied the application for an interlocutory injunction, on the ground that said affidavit of Appellee, not having been denied by Appellant, prevented the issuance of such interlocutory injunction on any ground of an arbitrary action by said Appellee. Thereafter the lower Court, composed of one judge, sustained the motion to dismiss the amended complaint and such amended complaint was dismissed. The amended complaint



was filed after leave of Court first obtained and in order to meet the views of the Court, composed of three judges, as expressed in its opinion, denying the application for an interlocutory injunction based upon the original complaint. There can be no question that the allegations of the amended complaint were sufficient to base relief on in connection with the charges against the Appellee, and evidently the lower Court in dismissing such amended complaint rested its decision upon the said affidavit of the Appellee. No argument is necessary to show that such action of the lower Court is erroneous.

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The lower Court in the two opinions denying interlocutory injunctions (See pp. 25 to 31 inc., and 34 to 39 inc.), announced that the case of *Interstate Motor Transit Co. v. Kuykendall*, 284 Fed. 882, decided by the same Court, was binding and decisive of the instant case, relating to interstate commerce.

An examination of the *Interstate Motor Transit Co. v. Kuykendall* case disclosed that an action was instituted, against the Director of the Department of Public Works, E. V. Kuykendall, to have all of the provisions of Chap. 111, of the Laws of 1921, declared unconstitutional and for an injunction

against said Kuykendall, restraining him from enforcing any of the provisions of said law. There were no allegations in the complaint showing that the company had complied with any law of the State or any provision thereof, relating to and regulating motor vehicles, their owners or drivers, in the use of public highways; and further, no allegation showing that the company had complied with or had offered to comply with any of the provisions of said Chap. 111. The Court, in its opinion based the refusal of relief, as far as interstate commerce was concerned, upon decisions of the Supreme Court of the United States, which held that a State could constitutionally require the payment of license or tolls for the use of improvements on navigable waters and highways, which improvements had been made at the cost of the State and gave additional facilities to the commerce; the plaintiff company had not complied with such reasonable exactions for the use of such highways and did not even offer so to do, and therefore the State law which required such payments for the use of such highways was constitutional and that the company was not entitled to any relief. In such opinion the Court cited the cases of *Hendrick v. Maryland*, 235 U. S. 610;

59 L. ed. 385, and *Kane v. New Jersey*, 242 U. S. 160; 61 L. ed. 222, as conclusive. Such cases decided that a non-resident, coming into a state and using the public highways with his automobile, was obliged to pay a reasonable license fee as compensation for the use of improvements on the highways, and submit to a reasonable regulation compelling the registration of his automobile without cost.

Both of said cases had been instituted prior to the "Federal Highway Act," and such Act was not involved in the cases.

In the instant case the record discloses that in every way, manner and form, the Appellant had complied with each and every provision of every law relating to and regulating motor vehicles, their owners and drivers, on public highways, having paid all license fees and being entitled to the use of the public highways by his motor vehicles.

*Carlsen v. Cooney, supra.*

The above cases, as well as all the other cases cited in the opinion in said *Interstate Motor Transit Co. v. Kuykendall* case *supra*, on such proposition do not even intimate that the right to engage in interstate commerce could be prohibited, discriminat-

ed against or burdened, but hold that it is simply charged with reasonable fees or tolls to compensate the State for monies paid by it in order to improve the facilities for such commerce.

In the two opinions in the instant case, the Court, in spite of the fact that the allegations of the complaint and the amended complaint, and as set out in the said opinions, show that the Appellant had complied with all the laws, relating to and regulating motor vehicles, their owners and drivers, and had received license plates for each motor vehicle authorizing it to use the public highways of the State, carrying passengers for compensation, and had complied with all of the provisions of said law, Chap. 111, as amended, insofar as permitted to do, and that he was ready, willing and able to comply with any and every provision, again reiterated what was said in the said *Interstate Motor Transit Co.* case; namely, that the provisions of said law relating to the obtaining of a certificate or license was constitutional and the acts of the Appellee thereunder were not arbitrary and discriminatory, because the commerce clause did not prevent the State from exacting compensation for the use of the public highways of the State

by Appellant's motor vehicles, and that Appellant had not paid or offered to pay such license fees.

As is shown by the record, the only issues presented to the lower Court were, whether or not THE PROVISIONS OF CHAP. 111 OF THE LAWS OF 1921, AS AMENDED, RELATING TO THE OBTAINING OF A CERTIFICATE OR LICENSE, AND THE ACTS OF THE APPELLEE WERE CONSTITUTIONAL, ARBITRARY, DISCRIMINATORY AND CREATED A MONOPOLY ON FEDERAL-AIDED HIGHWAYS AS APPLIED TO INTERSTATE COMMERCE AND IMPAIRED THE CONTRACT BETWEEN THE FEDERAL GOVERNMENT AND THE STATE OF WASHINGTON.

There is not one single provision of said Chap. 111, as amended, that relates to the payment of one cent as compensation for the use of public highways of the State, the only provision is the charging of a per cent of the gross earnings of an Auto Transportation Company and all of such amount so collected is used entirely for the cost of the administration of the law itself.

## RESISTING MOTION TO DISMISS

It is claimed in a motion to dismiss this appeal, that this Court has no jurisdiction under the provisions of Sec. 238 of the Judicial Code. The ground being that there is no Federal question involved, as the Appellant is estopped from contesting the provisions of the State Statutes, by applying for the said certificate or license, under the provisions of Sec. 4 of Chap. 111, of the Laws of 1921. In support of such motion the Appellee has cited a large number of cases on the question of estoppel. All of such cases announce that estoppel must be based upon benefits accepted and received as it would be inequitable for anyone having received benefits under a State law to thereafter in another litigation endeavor to show the unconstitutionality of such law.

Evidently, in the face of the record and the decisions, the Appellee considered that he should change his position and thus prevent a decision on the merits in this case. This is a change of the entire position of the Appellee in the lower Court,

as in no way and at no time has Appellee ever intimated even, that Appellant was estopped or had waived his constitutional rights by endeavoring to obtain recognition by the Appellee of the right to engage in interstate commerce. In the first place, the acts of the Appellee in preventing the Appellant from entering into this State with interstate commerce were arbitrary, unreasonable and unconstitutional, and it is admitted in the brief on the motion to dismiss, if such were the facts, the motion to dismiss should be denied. In the second place, the order made by the Appellee denying the application was not a judicial act, but is legislative.

*Lake Erie & W. R. Co. v. State ex rel.  
Cameron*, 249 U. S. 422; 63 L. ed. 684.

We have a right to test the constitutionality of such order denying appellant the right to engage in interstate commerce, as the record shows we did, including the same in the specifications of error. Appellant was compelled to make such application to the Appellee in order to prevent arrest; he was given a form prepared by the Appellee, to fill out, which he was forced to do. In the first opinion in the Buck case, on the original bill of complaint, it was said by the Court that, the plaintiff had not complied

with the challenged act, and at bar announced that he did not propose to comply with the provisions of the act, and that "when the plaintiff disposes himself in harmony with the reasonable provisions of the Act and is denied permission to operate, the Courts are open to grant such relief as may be warranted by the law and the facts."

In consequence of such opinion, the Appellant was compelled to, and did file the amended bill of complaint so as to show that he had complied with all the provisions of Chap. 111, as amended, and also all the rules and regulations of the Appellee, insofar as the Appellee would permit him so to do, and that he had been denied permission to operate in interstate commerce.

Such application and the refusal thereof by the Appellee and the opinion of the Court set forth in the record show that not only was any benefit derived by the Appellant, but that the Appellee was active in his endeavors, out of Court and in Court, to compel the Appellant to submit himself to the jurisdiction of said Appellee. We hardly think that Appellant is estopped from standing on his constitutional rights.



In a late case your Court held that the action of a railroad company in applying to the Railroad Commission of the State for a certificate authorizing a bond issue and the acceptance of the same upon refusal to pay the fee therefor, on the ground that interstate commerce was burdened thereby, was not estopped to attack the constitutionality of a Statute.

*Union Pac. R. Co. v. Public Service Comm.*, 248 U. S. 67; 63 L. ed. 131.

The opinion of the lower Court regarding the compliance by the Appellant with the said provisions of Chap. 111, or his offer to do so, was no doubt based upon the following excerpt from the opinion in the Hendrick v. Maryland case:

"If the Statute is otherwise valid, the alleged discrimination against residents of the District of Columbia is not adequate ground for us now to declare it altogether bad. At most they are entitled to equality of treatment, and in the absence of some definite and authoritative ruling of the Courts of the state, we will not assume that, upon a proper showing, this will be denied.

"The record fails to disclose that Hendrick had complied with the laws in force within the District of Columbia in respect of registering motor vehicles and licensing operators, or that he applied to the Maryland commis-

sioner for an identifying tag or marker.—prerequisites to a limited use of the highways without cost by residents of other states under the plain terms of section 140a. He cannot, therefore, set up a claim of discrimination in this particular. Only those whose rights are directly effected can properly question the constitutionality of a state statute, and invoke our jurisdiction in respect thereto.”

*Hendrick v. Maryland*, 235 U. S. 610,  
621; 59 L. ed. 385, 390.

We submit that the motion to dismiss should be denied and, that the decree of the lower Court be reversed and your Honorable Court enter such decree as may be proper, the premises considered.

Respectfully submitted,

W. R. CRAWFORD,

MERRILL MOORES,

*Solicitors for Appellant.*

Due and timely service of the within brief, by receipt of three (3)  
copies thereof, is hereby admitted this ..... day of  
..... A. D. 19.....

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.....  
Attorney.....for.....

NOV 13 19

WM. R. STAN

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**In the Supreme Court**  
**OF THE**  
**United States**

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OCTOBER TERM, 1924

A. J. BUCK,

*Appellant*

*vs.*

E. V. KUYKENDALL, Director of  
of Public Works of the State of  
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*Appellee*

NO. 345.

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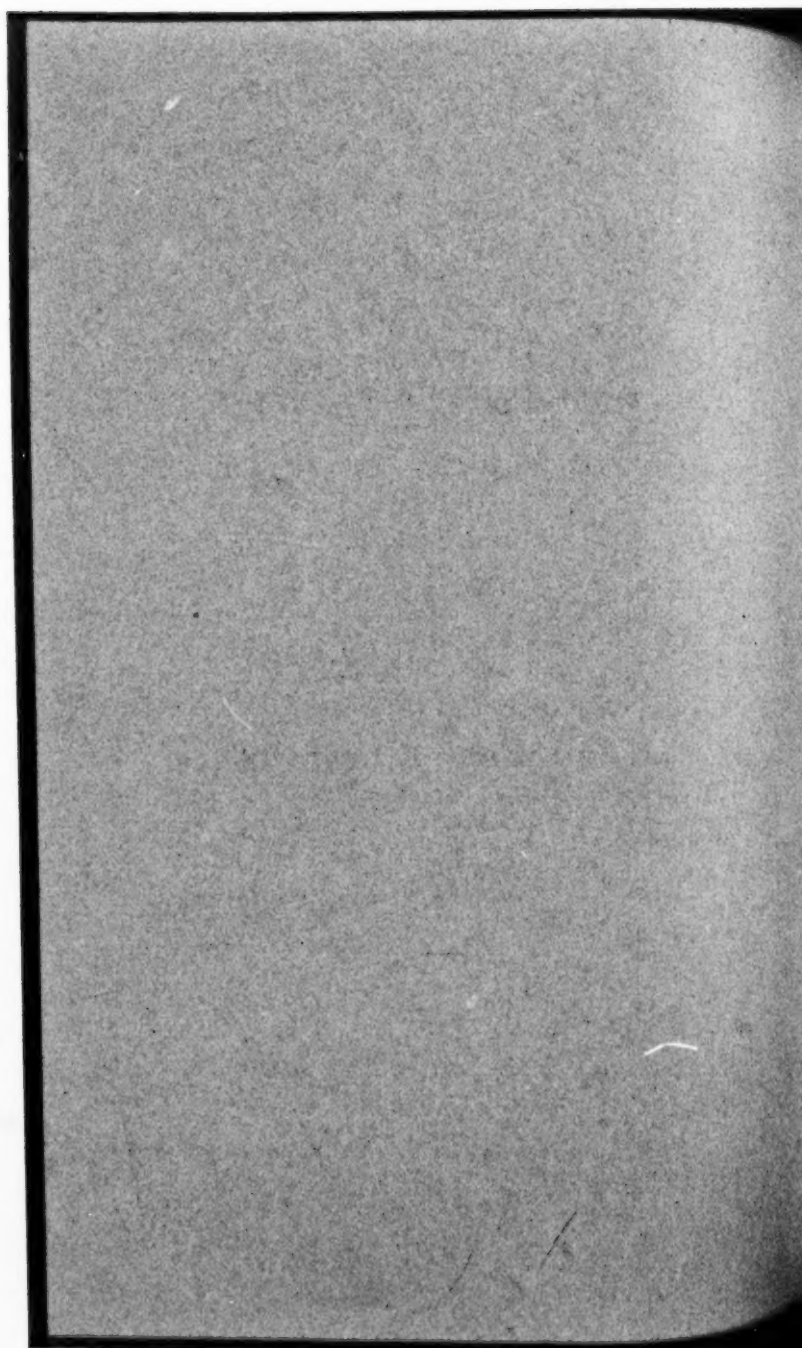
**REPLY BRIEF OF APPELLANT**

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W. R. CRAWFORD,

✓ MERRILL MOORES,  
*Attorneys for Appellant.*

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## REPLY BRIEF OF APPELLANT

Counsel for appelle in their brief have included what is claimed certain statements of fact covering Pages 12 to 16 inclusive. The Court is not given any information in what respect laws of twenty-four States are similar to Sec. 4 of Chap. 111 of the Laws of 1921. All such statements are outside of the record in this case.

Such brief does not mention the decisions set out in appellant's brief, except a few cases on the question of tolls and the appellant's position is sustained; and the cases of *Carlson vs. Cooney* and *Hendrick vs. Maryland*.

We call the Court's attention at this time to the following maxim set out in the opinion of your Honorable Court delivered by Mr. Justice Marshall:

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, where the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered to its fullest extent."

*Colieus vs. Virginia*,  
6 Wheat. 399, 5 L. ed. 290.

Apply such maxim to every case cited in the brief of appellee, as well as in the brief to be presented by Commissions of 17 States as amici curiae.

This Court has no issue before it involving intrastate rates of common carriers, a tax for the appropriation by poles on a highway or street, the

tearing up of sidetracks, the grading of right-of-ways, grade crossings, inspection fees, quarantine regulations, pilot fees, fees for compensation for the use of public highways, motor vehicle regulations, compelling registration of non-residents, drivers licenses, headlights on locomotives, regulations of jitneys on the streets of municipalities, the requiring of certificates or licenses to engage in intrastate business, and any other matters, except as shown to be the issues herein.

It is claimed in the brief of appellee that the instant case is the first case to come before this Court involving the constitutionality of State legislation requiring a certificate or license as a prerequisite to the right to engage in interstate commerce. And that Congress has not legislated regarding such interstate operation and that if this State law can be nullified by placing one terminal outside of the State the result would be disastrous to States having similar laws.

The Supreme Court of the United States has had before it for decision and has decided from the first case to the last that the provisions of a State law requiring a certificate or license to engage in inter-



state commerce are unconstitutional; that as applied to highways, Federal aided, any State law endeavoring to create a monopoly of the use of such a highway was unconstitutional; that any attempt by State legislation to impose any burden on or prohibit intercourse between States falls within the inhibition of the Federal Constitution. That not only is the mere commodity of interstate commerce, but also all of the instruments, means and places where interstate commerce is carried on, comes under the Federal Constitution; that any State law undertaking to discriminate against interstate commerce in favor of intrastate commerce is unconstitutional; that no State can prevent any person from going across a State line and setting up a business and then coming into the first State to engage in interstate commerce; that interstate commerce is not regulated by the motive of the party engaged in the same or how many do engage in it.

A brief on behalf of Commissions of 17 States as *amici curiae* is to be presented.

It is claimed in both of said briefs that Congress not having legislated, the different States under

their police power are empowered to legislate as to the safety, health and welfare of their own citizens.

CONGRESS HAS LEGISLATED ON SUCH SUBJECT and the State of Washington entered into a contract by which it has received Millions of Dollars from the Federal Government to construct and reconstruct international and inter-county highways. Entire supervision of "TRAFFIC" has been lodged in the Secretary of Agriculture of the United States, and in our brief we set forth the sections of such "Federal Highway Act" showing such to be the fact. It is claimed, however, that the record in the instant case fails to show that the Secretary has prescribed and promulgated all needful rules and regulations for the carrying out of the provisions of this Act, including recommendations to Congress and the State Highway Department as he may deem necessary for preserving and protecting the highways and insuring the safety of traffic thereon, and therefore the State of Washington has a right to prohibit "TRAFFIC" on Federal Aided Highways as well as interstate "TRAFFIC" thereon. We consider that the doctrine has been established by the decisions cited in our brief, (not even

mentioned in the said two briefs) which declares that if no regulation is placed by Congress on interstate commerce then it is the intention of Congress to permit such commerce to be untrammelled and unrestrained by any State law. But Congress has acted under the provisions of said "Federal Highway Act" and until the Secretary of Agriculture has prescribed and promulgated necessary rules and regulations regarding "TRAFFIC," the State has no power to legislate in respect to "TRAFFIC" on such highways, as the entire power by the Act of Congress has been vested in the Secretary of Agriculture. It seems to us that such provisions of such Act have taken away from the State of Washington the power to prohibit or create a monopoly on Federal Aided Highways.

Further, in our brief we cited a large number of cases showing that the inaction of Congress in promulgating and prescribing rules covering interstate commerce from one State into another is equivalent to a declaration that such commerce shall be free from any State interference. The main object of commerce among States under the Constitution would be defeated by discriminating legislation of the State.

The Court has before it statements contained in the brief of the appellee as well as the brief of the amici curiae claiming a large number of the States have passed laws similar in character to the law of the State of Washington. Both briefs fail to show in what respect all of said laws are similar. But we are only concerned with Section 4 of the Washington law and the law of the State of Oregon in respect to the use of highways in such State in relation to motor propelled vehicles carrying persons for compensation. We plead the Oregon law by title (Rec. P. 9) and we herewith set out verbatim Sec. 4 of such law under which auto transportation companies receive a certificate or license.

*“Section 4. No transportation company, as defined in section 1 of this act, shall hereafter operate any motor vehicle, motor truck, motor bus, bus trailer, semitrailer or other trailer in connection therewith for the transportation of persons or property for compensation on any public highway of this state without having first obtained from the public service commission of Oregon a certificate which shall set forth the special terms and conditions under which permission is granted to operate any of the vehicles above mentioned. No permit held or owned or obtained by any transportation company shall be assigned, leased or transferred **except upon** authorization by the public service commission of Oregon. A permit issued by the public service com-*

*mission to operate any motor vehicle or other vehicle prescribed by this act for compensation over any of the highways of the State of Oregon shall not be an exclusive right or license to operate over any route, road, highway, or between any fixed termini, but the special conditions of service and protection or such other condition as may be set out in such permit, together with the general regulations of the public service commission, shall be the conditions with which any other transportation company must comply before being granted a permit or license to operate motor vehicles or other vehicles in similar service, and any transportation companies complying with such conditions shall be entitled to a like permit or license."*

Such provision of the Oregon law permits the use of the "Pacific Highway" from Portland, Oregon, to Vancouver, Washington, and the appellant having received such permit was halted at the boundary line at Vancouver and informed that the Camas Stage Company, a Washington corporation, has received from the State of Washington the exclusive monopoly to use such public highway from Vancouver, Wash., to Kelso, Wash., for operating motor vehicles carrying passengers for compensation and the appellant was threatened with arrest if he came across the boundary line carrying persons who had paid compensation for the carriage

in his motor vehicles on such "Pacific Highway" to Tacoma or Seattle, from Portland, Oregon.

If the statements contained in the said briefs of appellee and amici curiae that 17 States have enacted laws similar to section 4 of the Washington law it is indeed time that the commerce clause of the Constitution should be enforced. In a leading case the Supreme Court had before it the question of the constitutionality of the law of New York vesting a monopoly on the waters of New York for vessels operated by steam. Adjoining States passed retaliating laws. The Supreme Court decided that the State law was unconstitutional and that the very condition that had arisen by reason of such different laws had been foreseen and the commerce clause of the Constitution had been adopted so as to prevent such discriminating legislation by adjoining States.

*Gibbons v. Ogden,*  
9 Wheat. 1, 6 L. ed. 63.

Other cases of similar import and reaffirming the principle announced in the above case have been cited in our brief.

In the case of *St. Louis v. Western Union Tel. Co.*, cited in appellee's brief, where a tax of \$5.00 per pole was levied, this Court declared such ordinance constitutional on the ground that the pole appropriated the part of the street occupied by it. In the opinion of the Court, delivered by Mr. Justice Brewer it was said:

“While for the purposes of travel and common use they are open to the citizens of every State alike, and no State can by its legislation deprive the citizens of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another State, or a corporation of a National government, it is within the competency of the State, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation.”

The record shows that appellant desires to use the “Pacific Highway” in the same manner as other citizens use the same and did not intend to use the same as a place of business, but as a thoroughfare (Rec. P. P. 6, 9).

We cite two cases not cited in our first brief. Where Congress has not acted in connection with regulation of interstate commerce, the Court held

that such silence by Congress prohibited State action as such particular commerce was declared to be free and untrammelled.

*State ex rel. Barrett v. Kansas City Nat. Gas Co.*

Vol. 44, No. 17, Sup. CT. Rep. 544.

A State Statute restricting transportation of natural gas within the limits of the State was held unconstitutional, as it prohibited interstate commerce. No Act of Congress had been passed as to such particular question.

*Penn. v. W. Virginia,*  
262 U. S. 553. 67 L. ed. 117.

We find again that both the appellee and the amici curiae are endeavoring to cloud the real issue in this case by contending that section 4 of Chap. 111, of the laws of 1921, relate to regulations designed for the safety, health and welfare of the public, as well as furnishing compensation for the use of public highways by motor vehicles.

**THERE ARE NO SUCH ISSUES IN THIS CASE.** The appellant has paid all the fees and charges required in order to use the public high-



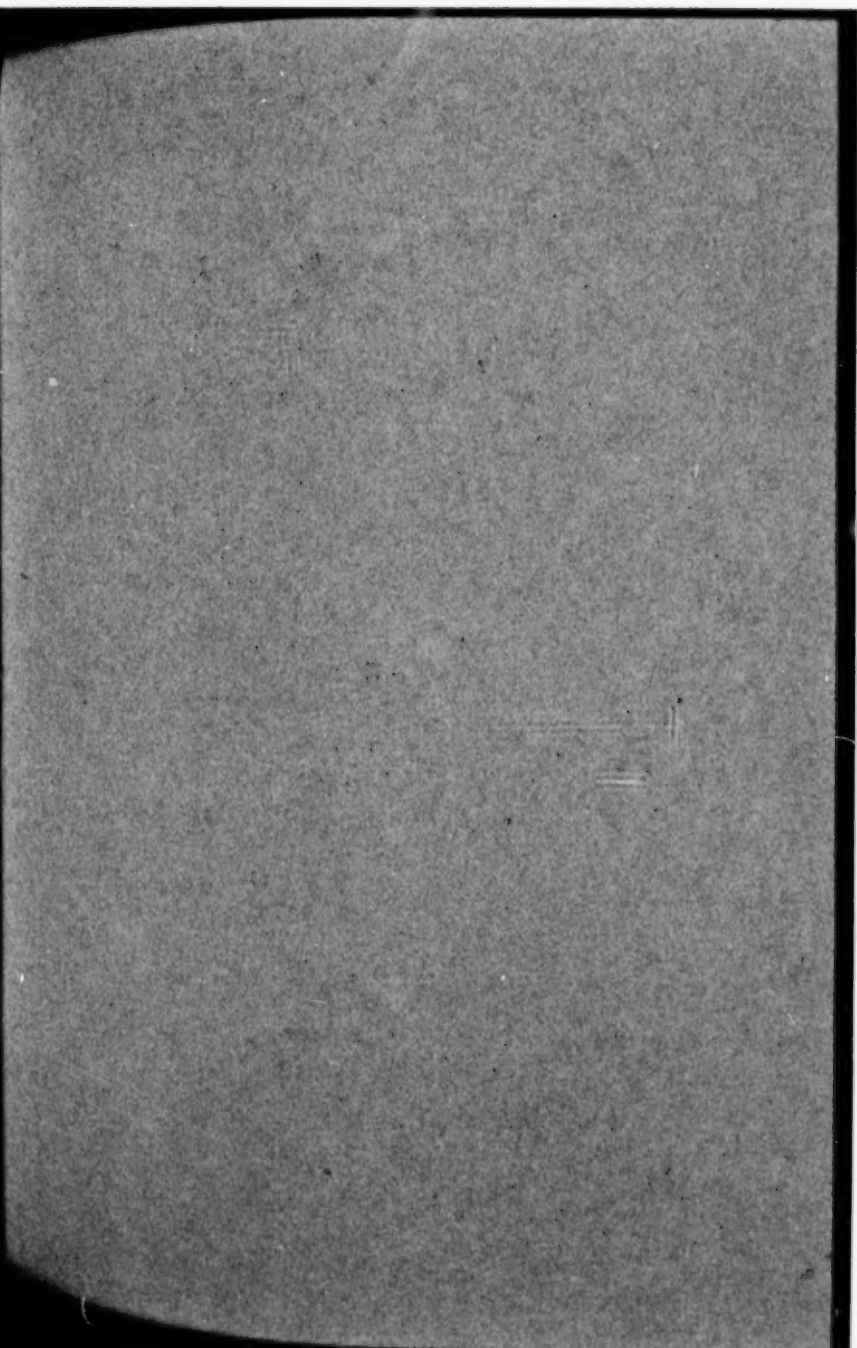
ways with his motor vehicles, as well as the drivers license fees, and has complied and is ready, willing and able to comply with all the motor vehicle laws in which is found the regulations relating to the use of public highways by motor vehicles.

The *Carlson v. Cooney* case, 123 Wash. 441, decided that such motor vehicle law contained the complete regulation of the use of public highways by motor vehicles and such fact is admitted in the amended complaint. (Rec. P. 3).

Respectfully submitted,

W. R. CRAWFORD,  
MERRILL MOORES,

*Solicitors for Appellant.*



IN THE  
**SUPREME COURT**  
OF THE  
UNITED STATES

---

No. 345.

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OCTOBER TERM, 1924.

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A. J. BUCK,	<i>Appellant,</i>	}
v.		
E. V. KUYKENDALL, Director of Public Works of the State of Washington,	<i>Appellee.</i>	

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**MOTION TO DISMISS**

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JOHN H. DUNBAR,  
*Attorney General of the  
State of Washington,*

H. C. BRODIE,  
*Assistant Attorney General of  
the State of Washington,  
Counsel for Appellee.*

VANCE & CHRISTENSEN,  
*Of Counsel.*

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# In the Supreme Court of the United States

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No. 345.

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OCTOBER TERM, 1924.

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A. J. BUCK,	<i>Appellant,</i>	}
v.		
E. V. KUYKENDALL, Director of Public Works of the State of Washington,	<i>Appellee.</i>	

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## PROOF OF MAILING PAPERS

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STATE OF WASHINGTON,	}	ss.
COUNTY OF THURSTON.		

The undersigned being first duly sworn on oath deposes and says: that on October 9th, 1924, at Olympia, Washington, he deposited in the United States post office, in a sealed envelope addressed "W. R. Crawford, 325 Lumber Exchange Building, Seattle, Washington," true copies of the papers en-

titled in this case styled "Notice," "Motion to Dismiss," "Statement" and "Argument."

.....

Subscribed and sworn to before me this.....  
day of October, 1924.

.....

*Notary Public in and for the State  
of Washington, residing at Olympia,  
Washington.*

My commission expires.....



# IN THE SUPREME COURT OF THE UNITED STATES

---

No. 345.

---

OCTOBER TERM, 1924.

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A. J. BUCK,	<i>Appellant,</i>	}
v.		
E. V. KUYKENDALL, Director of Public Works of the State of Washington,	<i>Appellee.</i>	

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## NOTICE.

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To—

A. J. BUCK, *Appellant*, and to  
W. R. CRAWFORD, his counsel:

PLEASE TAKE NOTICE that on Monday,  
November 10, 1924, at 12 o'clock noon, or as soon  
thereafter as counsel may be heard, the appellee  
herein will submit to the consideration of the court  
his motion to dismiss, a copy of which is attached.

JOHN H. DUNBAR,  
*Attorney General of the  
State of Washington,*

H. C. BRODIE,  
*Assistant Attorney General of  
the State of Washington,  
Counsel for Appellee.*



# IN THE SUPREME COURT OF THE UNITED STATES

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No. 345.

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OCTOBER TERM, 1924.

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A. J. BUCK,	<i>Appellant,</i>	}
v.		
E. V. KUYKENDALL, Director of Public Works of the State of Washington,	<i>Appellee.</i>	

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## MOTION TO DISMISS.

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Now comes the appellee herein and moves the court to dismiss the appeal herein upon the following grounds:

### I.

That this court has no jurisdiction to review the judgment of the District Court for the reason that no Federal question is involved.

JOHN H. DUNBAR,  
*Attorney General of the  
State of Washington,*

H. C. BRODIE,  
*Assistant Attorney General of  
the State of Washington,  
Counsel for Appellee.*

VANCE & CHRISTENSEN,  
*Of Counsel.*



## STATEMENT.

For the purpose of the motion hereinbefore set out, the facts involved may be stated as follows:

The 1921 Legislature of the State of Washington passed an act known as Chapter 111, Laws of 1921, being entitled,

“AN ACT providing for the additional supervision and regulation of the transportation of persons, and property for compensation over any public highway by motor propelled vehicle: Defining transportation companies and providing for additional supervision and regulation thereof by the public service commission, providing for the enforcement of the provisions of this act and for the punishment of the violations thereof.”

Section 4 of this act provides as follows:

“No auto transportation company shall hereafter operate for the transportation of persons and, or, property for compensation between fixed termini or over a regular route in this state, without first having obtained from the Commission under the provisions of this act a certificate declaring that public convenience and necessity require such operation; but a certificate shall be granted when it appears to the satisfaction of the commission that such person, firm or corporation was actually operating in good faith, over the route for which such certificate shall be sought on January 15th, 1921. Any right, privilege, certificate held, owned or obtained by an auto transportation company may be sold, assigned, leased, transferred or inherited as other property, only upon authorization by the Commission. The Commission shall have power, after hearing, when the applicant requests a certificate to operate in a

territory already served by a certificate holder under this act, only when the existing auto transportation company or companies serving such territory will not provide the same to the satisfaction of the Commission, and in all other cases with or without hearing, to issue said certificate as prayed for; or for good cause shown to refuse to issue same, or to issue it for the partial exercise only of said privilege sought, and may attach to the exercise of the rights granted by said certificate to such terms and conditions as, in its judgment, the public convenience and necessity may require."

Pursuant to said act, and particularly section 4 thereof, the appellant herein made an application to the Department of Public Works of the State of Washington for a certificate of convenience and necessity to operate as an auto transportation company in the carriage of passengers and express between Seattle and Tacoma, Washington, and Portland, Oregon. A hearing was had before the said Department of Public Works and findings of fact made and an order entered by said department denying the said application, which order was made in June, 1923. A summary of the provisions of these findings and order will be found in the opinion of the statutory court (Tr., p. 34; 295 Fed. 204), and the findings and order are printed in full in *In re Buck*, P. U. R. 1923E 737. In October, 1923, the appellant filed a complaint in the District Court of the United States for the Western District of Washington, Southern Division (Tr., p. 16), seeking to enjoin the Department of Public Works of the State

of Washington from interfering with his operation as an auto transportation company between Seattle and Tacoma, Washington, and Portland, Oregon, and applied to said District Court under section 266 for a temporary injunction. A hearing was had before the statutory court and the temporary injunction denied. (Tr., p. 25; 295 Fed. 197.) Leave was thereafter granted to file an amended complaint, and appellant, on December 22, 1923, filed in said court his amended complaint (Tr., p. 1), and renewed his application for a temporary injunction, which application was again heard by the statutory court under section 266 of the Judicial Code and the temporary injunction again denied. (Tr., p. 34, 295 Fed. 203.) On January 21, 1924, the appellee's motion to dismiss the amended bill of complaint was heard before the District Court and an order entered dismissing the bill and the suit. (Tr., pp. 12 and 13.) An appeal was prosecuted to this court from such dismissal.

## ARGUMENT.

An appeal direct from the District Court to the Supreme Court can only be taken pursuant to the provisions of section 238 of the Judicial Code. The only grounds set forth in that section which could be claimed to be applicable in this case are that the judgment complained of "involves the construction or application of the Constitution of the United States," or that the "constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

The amended bill of complaint alleges that the acts of the appellee and the statute above referred to deprive appellant of his property without due process of law and place a burden upon interstate commerce in contravention to the Fourteenth Amendment and section 8 of Article I of the Constitution of the United States. An examination of the amended bill of complaint, however, will show that it is not charged that the action of appellee was unreasonable, arbitrary, capricious or fraudulent in itself, and if the statute is valid, we are satisfied the bill of complaint does not allege any facts which would bring it within section 238, *supra*. In its final analysis the complaint resolves itself into an allegation that section 4 of chapter 111 of the Laws of Washington for 1921, being section 6390, Remington's Compiled Statutes, is unconstitutional.



The allegation of the unconstitutionality of this section of the statute is undoubtedly sufficient to bring appellant within the provisions of section 238, *supra*, if the appellant is in position to urge such question. For reasons hereinafter set forth, we believe that appellant is estopped from contesting the validity of this statute, and if such be the case, there would remain no Federal question as a foundation for an appeal to this court.

We believe that this case is governed by the principles of law set forth in the following texts:

Note in 19 Ann. Cas. 183 and Ann. Cas. 1915C 62, states:

"It is well settled as a general proposition that a person who has invoked the benefit of an unconstitutional law cannot in a subsequent litigation aver its unconstitutionality as a defense."

In the article on constitutional law in 12 C. J. 769, section 190:

"A person may by his acts or omission to act, waive a right which he might otherwise have under the provisions of a constitution; and where such acts or omissions have intervened, a law will be sustained which otherwise might have been held invalid, if the party making the objection had not by prior acts precluded himself from being heard in opposition. Thus, a person who has participated in proceedings under a statute, or who has acted under the statute and in pursuance of the authority conferred by it, or who has claimed the benefit of the statute to the detriment of others, or who asserts rights under it, may not question its constitutionality."

In the article on constitutional law, 6 R. C. L. 94, section 95:

“The rule is now generally recognized that one who invokes the provisions of a law may be denied the right to question its constitutionality, and cannot even in subsequent litigation aver its unconstitutionality as a defense.”

The foregoing principle of law has been repeatedly announced by this court. In the case of *Pierce Oil Corporation v. Phoenix Refining Co.*, 259 U. S. 125, 128; 66 L. ed. 856, 857, the statutes of Oklahoma provided that every corporation engaged in that state in the carrying of crude petroleum through pipe lines should be deemed a common carrier. After the passage of this statute the Pierce Company qualified as a foreign corporation to do business in Oklahoma and upon its refusal to convey petroleum for the Phoenix Company, a hearing was had by the Oklahoma Corporation Commission and an order entered holding the Pierce Company a common carrier and requiring it to carry oil for the Phoenix Company. This court, on writ of error from the Supreme Court of the State of Oklahoma to review a judgment which affirmed the order of the Corporation Commission affirmed the state court. The following language is used with reference to the estoppel operating against the Pierce Company to allege the unconstitutionality of the Oklahoma statute:

“When the large discretion which the state had to impose terms upon this foreign corporation as a condition of permitting it to engage in wholly intra-

state business is considered, \* \* \* *the contention that this order of a tribunal to the jurisdiction of which the company voluntarily submitted itself, made after notice and upon full hearing, deprives it of its property without due process of law, must be pronounced futile to the point almost of being frivolous.* 'By accepting the privilege it voluntarily consented to be bound by the conditions' attached to it (216 U. S. 56, 66); and, while enjoying the benefits of that privilege, it will not be heard to complain that an order, plainly within the scope of statutes in effect when it entered the state, is unconstitutional. A claim so similar to the one we have here that the disposition of it should have been accepted as disposing of this case was dealt with by this court in the Pipe Line Cases \* \* \*, in a single sentence, saying: 'So far as the statute contemplates future pipe lines, and prescribes conditions under which they may be established, there can be no doubt that it is valid.'

"There is nothing in the nature of such a constitutional right as is here asserted to prevent its being waived or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right. \*  
\* \* " (Italics ours)

The case of *Wall v. Parrot Silver and Copper Mining Co.*, 244 U. S. 407, 411; 61 L. ed. 1229, 1231, involved an appeal from the District Court of Montana to review a decree in favor of defendants in a suit by minority stock holders to set aside an executed sale of all the property and assets of the corporation. The plaintiffs based their cause of action upon the alleged unconstitutionality of a Montana statute. This court affirmed the District Court and with reference to the question of estoppel, says:

"There remains the contention that the statutes of Montana which we have epitomized, if enforced, will deprive the appellants of their property without due process of law because they provide that sale may be made of all the assets of the corporation when authorized by not less than two thirds of the outstanding capital stock of the corporation, and that the plaintiffs must accept either the payment for their shares which this large majority of their associates think sufficient, or, if they prefer, the value in money of their stock, to be determined by three appraisers, or, still at the election of appellants, by a court and jury.

*"This record does not call upon us to examine into this challenge of the validity of these statutory provisions, similar as they are to those of many other states and of a seemingly equitable character, for the reason that the appellants, by their action in instituting a proceeding for the valuation of their stock, pursuant to these statutes, which is still pending, waived their right to assail the validity of them."* \*

\* \* They cannot claim the benefit of statutes and afterwards assail their validity. There is no sanctity in such a claim of constitutional right as prevents its being waived as any other claim of right may be." (Italics ours)

The case of *Grand Rapids & Indiana Ry. Co. v. Osborn*, 193 U. S. 17, 29, 48 L. ed. 598, 604, was a writ of error to the Supreme Court of the State of Michigan to review a judgment affirming an order of a Circuit Court of that state awarding a peremptory writ of mandamus to compel a reduction of railroad rates in conformity with a state act. This court affirmed the State Supreme Court. The railroad company had incorporated in Michigan under the Michigan statutes and it was held that the company was

estopped to contest the validity of the provisions of that incorporation act regulating railroad rates which formed one of the burdens attached by the statute to the privilege of becoming an incorporated body. With reference to this question of estoppel this court said:

“It results from the foregoing that Sims—the purchaser of the railroad property in question at the sale under foreclosure—and his associates could not demand to be incorporated under the statutes of Michigan as a matter of contract right. Possessing no such contract right, they or their privies cannot now be heard to assail the constitutionality of the conditions which were agreed to be performed when the grant by the state was made of the privilege to operate as a corporation the property in question. Having voluntarily accepted the privileges and benefits of the incorporation law of Michigan the company was bound by the provisions of existing laws regulating rates of fares upon railroads, and it is estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporated body.”

The case of *Shepard v. Barron*, 194 U. S. 553, 567; 48 L. ed. 1115, 1120, was an appeal from the Circuit Court of the United States in Ohio to review a judgment dismissing a bill to enjoin a county treasurer from proceeding to collect a balance of an assessment for a public improvement. This court affirmed the Circuit Court. The appellants, being property owners, had petitioned for the improvement under a state act, had participated in carrying out the work and recognized the justice of the assessments from time to time during the progress of the

work, and had filed a statement for the purpose of inducing the issuance and purchase of county bonds, and it was held that they were estopped from contesting the constitutionality of the method of assessment provided for in the act. With reference to this question of estoppel, this court said:

*"On principles of general law, we are satisfied that the plaintiffs are not in a position to assert the unconstitutionality of the act under which they petitioned that proceedings should be taken, and that the assessment should be made in accordance with those provisions."* (Italics ours)

The case of *Pierce v. Somerset Railway*, 171 U. S. 641, 648, 43 L. ed. 316, 319, was a writ of error to the Supreme Court of Maine to review a judgment in favor of the Somerset Railway in an action commenced by it against Louis Pierce, et al., to enjoin the further prosecution of certain actions. The writ was dismissed. It was held that the plaintiff in error was estopped to contest the validity of the state statute involved. With reference to estoppel, this court said:

"A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute, and the question whether he has or has not lost such right by his failure to act, or by his action, is not a Federal one."

The case of *Electric Co. v. Dow*, 166 U. S. 489, 490, 41 L. ed. 1088, 1089, was a writ of error to the Supreme Court of New Hampshire to review a judgment against the Electric Co. upon a petition filed

by Dow for the assessment of damages occasioned to his land by an overflow caused by a dam erected by the defendant company. The state court was affirmed. The proceedings for the assessment of damages were instituted under a statute of New Hampshire. It was held that a party electing to have damages assessed in the manner provided by the statute was estopped from denying the validity of another provision of the statute providing for the addition of fifty per cent to the verdict of the jury. With reference to estoppel this court said:

"We agree with the supreme court of New Hampshire in thinking that the plaintiff in error, by availing itself of the power conferred by the statute, and joining in a trial for the assessment of the damages, is precluded from denying the validity of that provision which prescribes that 50 per cent shall be added to the amount of the verdict. The act confers a privilege, which the plaintiff in error was at liberty to exercise or not as it thought fit."

The case of *Ficklen v. The Taxing District of Shelby County*, 145 U. S. 1, 24, 36 L. ed. 601, 607, was a writ of error to the Supreme Court of Tennessee to review a judgment reversing a decree of the Chancellor which overruled a demurrer and decreed a perpetual injunction in behalf of Ficklen to restrain the collection of a tax on his business. The judgment of the state court sustained the demurrer and dismissed the suit, and this court affirmed the state court. The plaintiff in error and others had taken out licenses under a Tennessee statute to do



a general commission business and had given bond to report their commissions during the year and to pay the required tax thereon, and it was held that they could not when applying for a similar license the next year, resort to the courts because the municipal authorities refused to issue such licenses without the payment of the stipulated tax. It was held that having complied with the statute, they were estopped from contesting its constitutionality. With reference to a question of estoppel, this court said:

“\* \* \* We agree with the Supreme Court of the State that the complainants having taken out licenses under the law in question to do a general commission business, and having given bond to report their commissions during the year, and to pay the required percentage thereon, could not, when they applied for similar licenses for the ensuing year, resort to the courts because the municipal authorities refused to issue such licenses without the payment of the stipulated tax. What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no licenses therefor, but had simply transacted business for non-resident principals, is an entirely different question, which does not arise upon this record.”

The case of *Great Falls Manufacturing Co. v. Garland*, 124 U. S. 581, 600, 31 L. ed. 527, 533, was an appeal from the United States Circuit Court for the District of Maryland dismissing a suit brought to restrain defendants from occupying certain land. This court affirmed the Circuit Court. It was held that the plaintiff, by suing the United States in the



Court of Claims, had assented to the taking of his property by the government for public use under a certain act of Congress and had agreed to submit the determination of the question of compensation to the tribunal named by Congress and had waived the right that compensation be paid in advance of taking and the right to demand that the amount of compensation be determined by a jury. With reference to his estoppel to contest the validity of the act of Congress involved in that litigation this court said:

"It is scarcely necessary to say that it is immaterial that the plaintiff invoked the jurisdiction of the court of claims from fear that, if it did not file its petition in that court within the time limited, it might lose the right to demand compensation for its property. If the act of the Secretary of War in taking possession of the property was in violation of law, neither he nor his agents could rightfully hold possession against the plaintiff; in which case the plaintiff might have stood upon its rights, under the Constitution, and invoked judicial authority for such protection as the law would afford against the unauthorized acts of public officers. But the plaintiff chose to acquiesce in the taking of its property for public use, and to accept the offer of the Government to have the amount of compensation fixed by the court of claims, according to its peculiar modes of procedure. The reasons inducing the plaintiff to adopt such a course can have no influence upon the action of that court, nor affect its power to ascertain and award just compensation for the loss of the property."

Other cases of this court on similar questions of estoppel and waiver are:

*Milheim v. Moffat Tunnel Improvement District*, 220 U. S. 710, 723; 67 L. ed. 1194, 1202;

*St. Louis Malleable Casting Co. v. Prendergast Construction Co.*, 260 U. S. 469, 67 L. ed. 351;

*Hurley v. Commission of Fisheries of Virginia*, 257 U. S. 223, 66 L. ed. 206;

*Farncomb v. City and County of Denver*, 252 U. S., 7, 11; 64 L. ed. 424, 427;

*Leonard v. Vicksburg S. & P. R. Co.*, 198 U. S. 416, 422; 49 L. ed. 1108, 1111;

*Detroit, Ft. Wayne & Belle Isle Ry. v. Osborn*, 189 U. S. 383; 47 L. ed. 860;

*Gallup v. Schmidt*, 183 U. S. 300; 46 L. ed. 207;

*Eustis v. Bolles*, 150 U. S. 361; 37 L. ed. 1111;

*Daniels v. Tearney*, 12 Otto 415; 26 L. ed. 187;

*Clay v. Smith*, 3 Peters 411; 7 L. ed. 723.

Innumerable cases might be cited from the lower Federal courts and the state courts, but in view of the repeated affirmance of this principle by this court it is unnecessary to cite any other cases than the above.

The examination of the amended bill of complaint in the instant case will show clearly that appellant made application to the department of public works of the State of Washington for a certificate of convenience and necessity to operate as an auto transportation company between Seattle and Tacoma, Washington, and Portland, Oregon, under the provisions of chapter 111, Laws of Washington, 1921,

and in such application, agreed to comply with all the statutes of the state relative to such operation, and the complaint sets forth that the appellant is and has at all times been willing to comply with all the provisions of the state statute. Paragraph 10 of the amended bill of complaint (Tr. p. 7), alleges:

“That the plaintiff, being desirous of engaging in interstate commerce by transporting persons for compensation between the cities of Seattle and Tacoma, Washington, and Portland, Oregon, and not doing any Intrastate business whatever and in order to carry on such business subject to all laws, rules and regulations of the State of Washington, did duly apply to the defendant herein for a certificate under the provisions of chapter 111 of the laws of 1921. That such application, sworn to by the plaintiff, was prepared on the form furnished by the defendant. That such printed form contained the following, being clause 13 thereof and reading as follows:

“ ‘Applicant is familiar with the provisions of chapters 96, 108 and 111, Session laws of 1921, and the Rules and Regulations of the Department of Public Works of Washington, governing the equipment and operation of motor vehicles upon the highways of the State of Washington and promises prompt compliance therewith.’

“That the plaintiff had complied and has complied with all of the laws, rules and regulations of the Department of Public Works in connection with the said application. That the said law chapter 111 and the rules and regulations of the said Department of Public Works required the plaintiff to do or perform no other thing in connection with the said application than he had done and performed. Further, the plaintiff on oath had promised prompt compliance with the provisions of chapters 96, 108 and 111, of the session laws of 1921, governing the equipment

and operation of motor vehicles upon the Public Highways of the State. That the (fol. 13) plaintiff had and has complied in all respects with the provisions of Chapter 96, of the Session laws of 1921, as amended, and Chapter 108 of the Session laws of 1921, as amended, as hereinbefore alleged. That the said defendant herein in June, 1923, entered an order on said application denying a certificate or license to said plaintiff to engage in said interstate commerce solely upon the grounds that the local service furnished by the said 4 certificate holders and the train service furnished adequate transportation between Seattle and Tacoma, Washington and Portland, Oregon; and that plaintiff if granted a certificate did not show sufficient financial ability to purchase or acquire motor vehicles to operate such interstate commerce. That plaintiff was and is now financially able to acquire motor vehicles sufficient in number to operate such interstate commerce and is financially able to do such business.

“That by reason of the said action of the said defendant, this plaintiff has not been and will not be able to comply with any other provision of Chapter 111, as amended, as defendant herein has refused to and will continue to refuse to permit the plaintiff so to do, and said denial of said certificate was not based upon the refusal of plaintiff to comply with any provisions of the laws or rules and regulations of the department as plaintiff had complied as far as he has been permitted so to do by said defendant with all laws, rules and regulations. Further, this plaintiff is ready, willing and able and agrees to and will conform to and comply with all of the provisions of Chapter 111, as amended, and the rules and regulations of the Department of Public Works of the State of Washington, regulating the equipment and the operations of motor vehicles on the Public Highways as specifically set forth in the said clause of the said application as herein above set forth.”

We respectfully submit that this application for a certificate under the statute admitted the validity of the law and was an attempt to obtain for the appellant all the benefits, privileges and advantages accruing to the holder of a certificate of convenience and necessity issued under the act. In other words, the appellant having sought to obtain the benefits of the act is, under the rule of the cases and texts above cited, estopped from questioning the validity and constitutionality of the act in question. The bill of complaint herein shows clearly that appellee's position is that of one who sought to obtain all the benefits of the statute of the State of Washington, and when, after a full hearing, and without any unreasonable, arbitrary, capricious or fraudulent action on the part of the state department charged with the administration of the act, he was denied the certificate of convenience and necessity sought, then, chagrined and disappointed by his failure to obtain the benefits sought, turns about and attacks the act under which he had applied, as unconstitutional and void.

We therefore urge that appellant's application for a certificate and his willingness to comply with all the provisions of the state statute have estopped him from contesting the validity of the act, and not being in position to urge before this court the unconstitutionality of the act challenged, there is no

Federal question involved in the appeal and this court should therefore dismiss the same.

Respectfully submitted,

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H. C. BRODIE,  
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*Counsel for Appellee.*

VANCE & CHRISTENSEN,  
*Of Counsel.*

# SUPREME COURT

OF THE  
UNITED STATES

OCTOBER TERM 1924

No. 145

A. L. BECK

*Appellant*

U. S. FEDERAL DIRECTOR OF PUBLIC  
WORKS OF THE STATE OF WASHINGTON

*Appellee*

Brief and Argument of Appellee

JOHN H. DUFFIN

Attorney General of the  
State of Washington

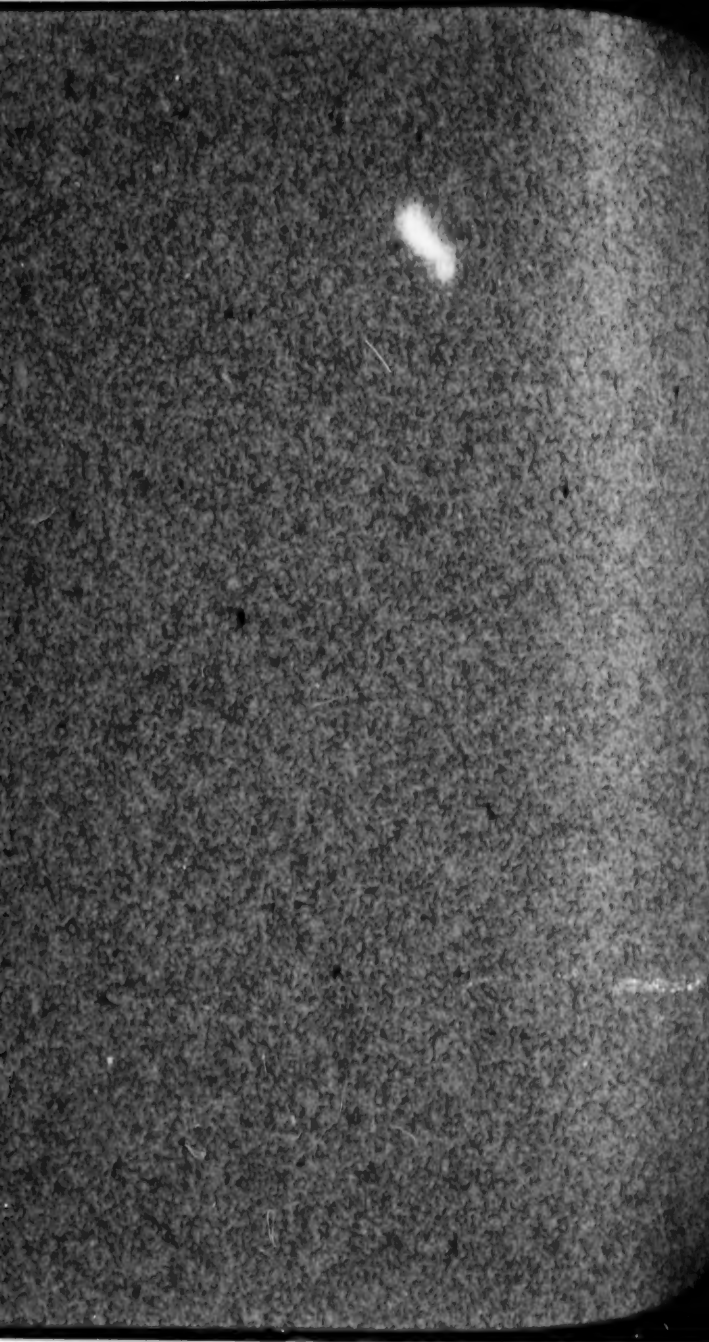
H. O. BROWN

Attorney General of the  
State of Washington

Respectfully Submitted

JOHN H. DUFFIN

Attorney General





IN THE  
**SUPREME COURT**  
OF THE  
UNITED STATES

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OCTOBER TERM, 1924.

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No. 345.

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A. J. BUCK,	<i>Appellant,</i>	}
v.		
E. V. KUYKENDALL, Director of Public Works of the State of Washington,	<i>Appellee.</i>	

---

**Brief and Argument of Appellee**

---

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IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

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OCTOBER TERM, 1924.

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No. 345.

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A. J. BUCK,	<i>Appellant,</i>	}
v.		
E. V. KUYKENDALL, Director of Public Works of the State of Washington,	<i>Appellee.</i>	

---

**Brief and Argument of Appellee**

---

**STATEMENT.**

This appeal involves the constitutionality of the auto transportation act of the state of Washington, being chapter 111, laws of 1921, with particular reference to the provisions of section 4 of said act relative to the issuance of certificates of convenience and necessity. The appellant in his brief has set forth the issues as made by the amended complaint and it is unnecessary to further summarize the



pleadings at this time. We desire, however, to give a chronological statement of the proceedings.

Under date of October 10, 1922, the appellant made application to the department of public works of Washington for a certificate of convenience and necessity for the operation of an auto stage line from Seattle, Washington, to Portland, Oregon. A hearing was had on this application before the department on March 29th, 1923, and on June 23, 1923, the findings and order of the department were made. The order of the department is printed in the 1923 Annual Report of the department at page 116, and in P. U. R. 1923E, 737. On October 31, 1923, the appellant filed his complaint in the District court seeking to enjoin the appellee from enforcing the said order. (Tr. p. 16). A hearing was had before the statutory court under section 266 of the judicial code and appellant's application for a preliminary injunction denied, the opinion being filed December 7, 1923. (Tr. p. 25, 295 Fed. 197). Paragraph VIII of appellant's complaint, (Tr. p. 21), stated that appellant had duly applied for a certificate of convenience and necessity under the state statute and had been denied. The statutory court in its opinion stated that appellant had not complied with any provisions of the challenged act and had announced that he did not propose to comply with said act and that if he disposed himself in harmony with the reasonable provisions of the act and was then denied permission to operate, the courts would be open to him.

Appellant then, on December 22nd, 1923, filed an amended complaint, (Tr. p. 1), paragraph X of which, (Tr. p. 7), set out in greater detail his application to the department of public works for a certificate under the state act in question, and his willingness to comply with all the provisions of said act. It will be noted that application was not made to the department as a result of the opinion of the statutory court, but that the amended complaint was simply for the purpose of showing an application to the department and an expressed willingness to comply with the act made long prior to the filing of the original complaint. A further hearing was had before the statutory court under section 266 and the application for the preliminary injunction under the amended complaint was denied by the statutory court in an opinion filed January 7th, 1924, (Tr. p. 34, 295 Fed. 203). On January 15th, 1924, appellee's motion to dismiss, (Tr. p. 12), was filed in the District court and after hearing before said court an order was entered dismissing the complaint on January 21, 1924. (Tr. p. 13). An appeal was prosecuted from such final order of dismissal. An application was thereafter made by appellant to the District court for a stay pending appeal, which was denied and application was made to this court on April 21, 1924, for a stay pending appeal, which was denied by this court on April 28, 1924, this court at that time, however, advancing the case on the docket to November 10, 1924, which date was later continued to November 17, 1924.

Before taking up a discussion of the legal issues we deem it advisable to call the court's attention to some general features of motor vehicle transportation in the state of Washington and particularly on the Pacific highway in said state, and to the development of auto transportation regulations by the various states along lines similar to that embraced in chapter 111, laws of Washington 1921.

This court can take judicial notice of the tremendous increase in the use of automobiles for pleasure and commercial purposes. A compilation made by the department of licenses of the state of Washington shows that the total number of motor vehicles registered in this state for the past eight years has been as follows:

1917	1918	1919	1920
103,001	131,298	161,147	186,827
1921	1922	1923 To Sept. 1, 1924	
195,074	220,957	269,749	294,730

It will be noted that the total registered for eight months of 1924 is almost three times as great as the total registered for the year 1917. The increase in mileage of paved highways has greatly facilitated the use of motor vehicles and such use will undoubtedly continue to increase.

The Pacific Highway extends through the state of Washington from British Columbia to Oregon. The appellant desired a certificate to operate auto busses for the transportation of passengers from Seattle to Portland, over said highway. This high-

way is paved throughout and is the main artery for travel by stage lines, truck lines, tourists and in fact all users of motor vehicles. An actual check of motor vehicles from different points on the Pacific highway made by members of the state highway police in different periods throughout the month of July and August, 1924, shows an average of daily traffic at the following points on the Pacific highway which would be along the line over which the appellant seeks permission to operate:

<i>Station</i>	<i>Average Of All Daily Traffic</i>	<i>Auto Stages</i>
1 M. N. of Vancouver, Clarke Co. ....	3278	27
Between Chehalis and Centralia, Lewis Co. ....	2679	13
E. of Olympia, Thurston County .....	3193	56
Lakeview, Pierce County .....	4736	118
Morningside, King County .....	7180	78

In connection with the supervision and regulations of auto transportation companies under the 1921 act referred to, 150 auto transportation companies were operating under certificates of convenience and necessity during the year 1923, using 578 auto stages and 90 auto transportation companies were operating under such certificates in carrying freight, using 337 auto trucks. Reports received by the department of public works from the operators of 556 auto stages during the year 1923 show that such stages traveled 12,794,000 miles and hauled 6,571,000 passengers. The business of such auto

transportation companies, in both freight and passenger, is growing by leaps and bounds and the continued development of paved highways and the popularity of auto service for passengers and the dispatch with which the trucks can handle freight make it certain that this auto transportation business will continue to develop rapidly.

The foregoing conditions relative to the use of motor vehicles are not peculiar to the state of Washington but are general throughout the entire United States. These conditions have caused the legislatures of many of the states to enact statutes for the regulation and supervision of the carrying of passengers and freight between fixed termini for hire by motor vehicles. These acts are all of recent origin and each year sees additional states enacting similar laws. So far as we are informed the following tabulation is a complete list of states which have auto transportation acts similar in character to chapter 111, laws of Washington 1921, or have provisions in their public utility acts conferring powers upon the public service commission similar to the provision of the special auto transportation acts:

Arizona	Chapter 130, Laws of 1919.
California	Statutes 1917, page 330. Statutes 1919, page 457. Statutes 1921, page 609. Deerings supp. 1917 to 1919 page 1518.
Colorado	Public Utilities Act, chapter 110, Laws of 1917.
Connecticut	Chapter 77, Public Acts 1921.

Illinois	Public Utilities Act, Laws 1921, Page 702.
Indiana	Public Utilities Act 1913, Sec. 97. Burns Ann. Stat., 1914, sec. 10052t 3.
Iowa	Chapter 97, Laws 1923.
Kentucky	Chapter 81, Laws 1924.
Maine	Chapter 184, Laws 1921. Chapter 211, Laws 1923.
Maryland	Chapter 180, Laws 1910. Chapter 445, Laws 1914. Chapter 401, Laws 1922. Chapter 291, Laws 1924.
Michigan	Act 209, Laws 1923.
New Hampshire	Chapter 86, Laws 1919.
New York	Chapter 495, Laws 1913. Chapter 667, Laws 1915. Chapter 307, Laws 1919.
North Dakota	Chapter 136, Laws 1923.
Oklahoma	Chapter 113, Laws 1923.
Oregon	Chapter 10, Laws 1921, Special Session.
Pennsylvania	Public Service Act, July 26, 1913, Laws of 1913, page 1375.
Rhode Island	Chapter 2221, Public Laws 1922, General Laws Rhode Island 1923, chapter 254, secs. 3722 to 3735.
South Dakota	Chapter 124, Laws 1923.
Utah	Public Utilities Code, chapter 47, Laws 1917.
Vermont	Act No. 91, Laws of 1923.
Virginia	Chapter 161, Laws of 1923. Chapter 222, Laws of 1924.
Washington	Chapter 111, Laws of 1921. Chapter 79, Laws of 1923.
Wisconsin	Chapter 546, Laws of 1915.

This is a total of 24 states or one-half of the states in the Union, which have found it necessary to provide for the supervision and regulation of these auto transportation companies. The instant case, however, is the first case to come before this court involving the constitutionality of the provisions of such acts relative to the requirement of a certificate of convenience and necessity as a prerequisite to the operation of such companies over the public highways of the state. Congress has passed no legislation regarding interstate operation of such companies and it is apparent, if the provisions of the state act can be nullified by locating one terminal of the route outside of the state so as to constitute interstate operation, it is a matter of great importance to all of the states in the Union and particularly those states which have adopted legislation of the character here under consideration.

We have not attempted to discuss the questions in the same order and manner adopted by appellant in his brief, because of the late service of his brief. The questions at issue relative to the constitutionality of the state statute regulating auto transportation companies will be treated under the following headings:

1. That the state statute does not violate the federal highway act.
2. That the state act does not violate the commerce clause of the United States Constitution.

3. That the state act does not violate the 14th amendment to the Constitution of the United States.

4. That the department of public works of Washington properly denied appellant a certificate of convenience and necessity.



## ARGUMENT.

## I.

THE STATE STATUTE DOES NOT VIOLATE THE  
FEDERAL HIGHWAY ACTS.

The Pacific highway was constructed in part with funds contributed by the federal government under the provisions of the Federal Aid Act (Act of July 11, 1916, 39 Stat. 355) and the Federal Highway Act (Act of November 9, 1921, 42 Stat. 212). Appellant contends that he has certain vested rights to operate motor propelled vehicles over such federal aid highways and that the provisions of the state act referred to are an unlawful restriction of such right.

It is unnecessary to discuss these federal acts in detail. The act of July 11, 1916, is entitled: "An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes."

Section 2 of the act defines rural post roads and this definition was amended by section 5 of the act of February 28, 1919, (40 Stat. 1200) to read as follows:

"That the Act entitled 'An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes,' approved July 11, 1916, is hereby amended to provide that the term 'rural post roads,' as used in section 2 of said Act, shall be construed to mean any public road a major portion of which is now used, or can be used, or forms a connecting link not to exceed ten miles in length of any road or roads now or hereaf-

ter used for the transportation of the United States mails, *excluding every street and road in a place having a population, as shown by the latest available Federal census, of two thousand five hundred or more*, except that portion of any such street or road along which the houses average more than two hundred feet apart."

Section 7 of the act of July 11, 1916, provides:

"To maintain the roads constructed under the provisions of this Act shall be the duty of the States, or their civil subdivisions, according to the laws of the several States. If at any time the Secretary of Agriculture shall find that any road in any State constructed under the provisions of this Act is not being properly maintained he shall give notice of such fact to the highway department of such State and if within four months from the receipt of said notice said road has not been put in a proper condition of maintenance then the Secretary of Agriculture shall thereafter refuse to approve any project for road construction in said State, or the civil subdivision thereof, as the fact may be, whose duty it is to maintain said road, until it has been put in a condition of proper maintenance."

The Federal Highway Act (Act of November 9, 1921, 42 Stat. 212) was an act to amend the Federal Aid act of 1916 and to extend and make more complete the system of federal aid highways. Section 12 of this act provides:

"That the construction and reconstruction of the highways or parts of highways under the provisions of this Act, and all contracts, plans, specifications, and estimates relating thereto, shall be undertaken by the State highway departments subject to the approval of the Secretary of Agriculture. The construction and reconstruction work and labor in each State shall be done in accordance with its laws

and under the direct supervision of the State highway department, subject to the inspection and approval of the Secretary of Agriculture and in accordance with the rules and regulations pursuant to this Act."

Section 14 of this act provides:

"That should any State fail to maintain any highway within its boundaries after construction or reconstruction under the provisions of this Act, the Secretary of Agriculture shall then serve notice upon the State highway department of that fact, and if within ninety days after receipt of such notice said highway has not been placed in proper condition of maintenance, the Secretary of Agriculture shall proceed immediately to have such highway placed in a proper condition of maintenance and charge the cost thereof against the Federal funds allotted to such State, and shall refuse to approve any other project in such State, except as hereinafter provided. \* \* \*

Section 18 provides:

"That the Secretary of Agriculture shall prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this Act, including such recommendations to the Congress and the State highway departments as he may deem necessary for preserving and protecting the highways and insuring the safety of traffic thereon."

The Federal Aid Act of 1916 as amended by the Federal Highway Act of 1921 provides for the construction by the state highway department of rural post roads and that upon certain terms and conditions the federal government will contribute funds to aid in such construction subject to the rules and regulations of the secretary of agriculture.

It is evident that under these acts the duty of maintenance of the highways and the general supervision, regulation and control of such highways remains in the state. There is nothing in either act to indicate the purpose of congress to deprive the state of any portion of its power to regulate the use of these federal aided highways, nor has Congress by this act legislated in any manner relative to the use of such highways. Both acts were enacted under the provisions of section 8, article 1 of the federal constitution giving congress power "to establish post-offices and post roads" but it surely cannot be urged that in the exercise of that power congress has attempted to divest the state of its reserve police power which includes the right to build, maintain and regulate highways for the convenience of its citizens. Congress has simply designated what roads shall be considered post roads and has made provision to assist the states in the construction of such roads, but that does not take such highways out of state jurisdiction and make them federal highways except for the very limited purpose of facilitating the transportation and delivery of mail.

The state of Washington, by chapter 76, Laws of 1917, accepted the Federal Aid Act, and such acceptance, no doubt, constitutes a contract between the Federal and state governments. Such contract, however, relates only to the construction, reconstruction and maintenance of Federal Aid highways, and does not affect the right of the state to regulate

the use of such highways so long as it does not impose any tolls for operation over such roads. As hereafter pointed out in this brief, the fees prescribed in chapter 111, Laws of Washington for 1921, as amended by chapter 79, Laws of 1923, are, in fact, not tolls.

It will be remembered that appellant seeks to use the highways as a common carrier for hire and it is well settled that a private individual has no vested right to use a public highway of the state as a common carrier.

Appellant's claim of a vested right to use these highways by reason of federal aid in their construction was rejected by the district court. The opinion of the statutory court denying a preliminary injunction on the original complaint after citing the definition of post road in section 2 of the 1916 act stated (*Buck v. Kuykendall*, 295 Fed. 197, 199):

"The court judicially knows that Seattle, Tacoma, Olympia, Chehalis, Centralia, and Vancouver are upon the route sought by the plaintiff, and each contains a population in excess of 2,500. By no stretch of the imagination could the plaintiff, by virtue of the provisions of the act of 1916, supra, assert any interest in the excepted roads and streets, and his assertion of vested right in any portion of the highway is absolutely baseless."

The statutory court after a statement of the general character of the 1916 and 1921 acts referred to, cited section 18 of the 1921 act and then stated at page 199:

"The Congress has not legislated with relation to the use of highways, to the construction of which

the United States contributed, other than as provided by section 18, *supra*, and if recommendations have been made by the Secretary of Agriculture to the state highway department, the presumption is that such recommendations have been carried out, nothing appearing to the contrary."

The right of the state to regulate the use of highways under its police power and that such regulations do not deprive appellant of any constitutional rights is discussed elsewhere in this brief. We think there can be no serious question that the decision of the district court is correct and appellant has no vested right to use the Pacific Highway or other federal aided highways within the state.

Appellant further contends that the provisions of section 9 of chapter 111 of the laws of Washington of 1921 as amended by section 1 of chapter 79, laws of Washington, 1923, violated the provisions of section 1 of the Federal Aid act and section 9 of the Federal Highway Act, that all highways constructed or re-constructed under the provisions of those acts "shall be free from tolls of all kinds."

Section 1, chapter 79, laws of Washington, 1923, amends section 9 of chapter 111, laws of Washington, 1921, to read as follows:

"For the purpose of carrying out the provisions of this act there is hereby created in the State Treasury a state fund to be known as the 'Auto Transportation Fund.' All fees collected by the Director of Public Works as herein provided shall be paid into the State Treasury monthly and shall be credited to the said 'Auto Transportation Fund.'

"All auto transportation companies operating under the provisions of this act shall between the 1st and 15th days of January, April, July and October of each year, file with the Director of Public Works a statement showing the gross operating revenue of such company for the preceding three months or portion thereof, and shall pay to the said Director a fee not to exceed one per cent of the amount of such gross operating revenue. The percentage rate of gross operating revenue to be paid as provided herein shall be subject to future adjustment by the Director of Public Works, which percentage not exceeding one per cent, shall be fixed by the said Director by general order duly entered at the beginning of each fiscal year, or at the beginning of any quarter. In fixing such rate the Director of Public Works shall take into consideration all moneys on hand in the said 'Auto Transportation Fund' to the end that the fund created hereunder shall be neither more nor less than sufficient to cover the cost of supervising and regulating auto transportation companies operating under the provisions of this act.

#### "MISCELLANEOUS FEES:

"All applications for a certificate of public convenience and necessity shall be accompanied by an application fee of .....	\$25.00
Applications for transfer of a certificate of public convenience and necessity .....	5.00
Application for the mortgaging of a certificate of public convenience and necessity .....	5.00
Application for the issuance of a duplicate certificate of public convenience and necessity.	3.00
Application for the issuance of copies of any records of the Department of Public Works pertaining to auto transportation companies, per 100 words or portion thereof ....	.15"

The contention that fees for licensing and regulating common carriers by motor vehicles violated



the toll prohibition of the federal highway acts was before the district court for the eastern district of Michigan, southern division, in the case of *Liberty Highway Co. v. Michigan Public Utilities Commission*, 294 Fed. 703, decided December 11, 1923, about the same time as the decision of the district court in the instant case. The Michigan district court held that such fees were not a violation of the federal acts. The language of the court at page 708 being as follows:

"Section 9 of the Federal Highway Act of November 9, 1921 (42 Stat. 212 [Comp. St. Ann. Supp. 1923, section 7477 $\frac{1}{4}$ h]), provides:

"All highways constructed or reconstructed under the provisions of this act shall be free from tolls of all kinds."

"This is not in our judgment intended to refer to license fees such as are here involved (it not being even claimed that such act has reference to the analogous fees imposed under general motor vehicle license laws, or to laws licensing drivers of such vehicles). *State v. Vigneaux*, 130 La. 424, 58 South. 135. The most that can be said of it in this connection is that such a provision is merely a condition attached, as between the federal government and the state, to the contribution of aid provided by federal legislation, and cannot deprive the state of its power and duty as trustee of the public highways for the benefit of the people of the state, to enact reasonable regulations in the exercise of its police power over such highways."

The District court in the *Liberty Highway* case had under consideration the validity of Act 209, Public Acts of Michigan 1923, which is very similar in its general character to chapter 111, Laws of



Washington 1921. The fee provision referred to in the above excerpt in the *Liberty Highway Company* case is found in section 8 of the Michigan Act and requires an annual payment based upon the weight of the motor vehicle. All fees received under the act are appropriated to the general highway fund of the state for highway purposes. It would seem that such fees would be much more like a toll for the use of the highway than the fees required under the Washington Act, which are for regulatory purposes only and are not expended on the highways, yet it will be noted that the District court in the *Liberty Highway Company* case held that such fees were not tolls under the Federal Highway Act.

It is quite uniformly held that a toll is a sum of money charged for the use of a road, bridge or the like of a public nature. Bouvier's Law Dictionary, Rawle's 3d Ed. p. 3283, defines the word "toll" as follows:

"A sum of money for the use of something generally applied to the consideration which is paid for the use of a road, bridge, or the like, of a public nature."

Webster defines the word as:

"A tax paid for some liberty or privilege, particularly the privilege of passing over a bridge or on a highway."

In the earlier history of this country, there was a charge levied either upon the vehicle or the passenger for the liberty of passing over a road, collected

by a toll taker, and the proceeds devoted to the upkeep and maintenance of the road.

See:

*Achison v. Huddleson*, 12 Howard, 293;

*Searight v. Stokes*, 3 Howard, 150;

*State ex rel. Hines v. Scott County Road Co.*,  
102 S. W. (Mo.) 752;

*St. Louis v. Green*, 7 Mo. App. 468.

In *Wadsworth v. Smith*, 11 Me. 278, it was tersely said:

“Toll is a settled, certain and defined sum exacted for the use of a common passage.”

In *State v. Vigneaux*, 58 So. 135 (La.) it was said:

“That (a toll) is something imposed in the locality where a passage way is used for the special benefit received. The use of a public road is not considered in that light.”

In *In re Ops*, 120 Atl. (N. H.) 629, it was said that a toll is not a tax, but simply a charge to reimburse the state for the use of a highway and that a gasoline tax could be constitutionally levied as such toll.

In *Commonwealth v. Closson*, 118 N. E. (Mass.) 653, a carrier of United States mail was arrested for failing to comply with certain statutory and municipal regulations relative to the operation of motor vehicles. The contention was made that the highway in question was a post road and that the mail carrier, therefore, was not amenable to state or municipal

regulations. Answering this, the Massachusetts court said:

"While undoubtedly they are post roads under Act. Cong. March 1, 1884, c. 9, enacting that 'all public roads and highways while kept up and maintained as such are hereby declared to be post routes' (U. S. Comp. St. 1916, Sec. 7457), and whoever knowingly and wilfully obstructs or retards 'the passage of the mail, or any carriage, \* \* \* driver, or carrier, \* \* \*' is upon conviction subject to fine, or imprisonment, or both, by U. S. Rev. Sts. Sec. 3995, Act of March 4, 1909, c. 321, Sec. 201, 35 Stat. 1127 (Comp. St. 1916, Sec. 10371), yet the ways remain public ways laid out and maintained by the commonwealth, which has the exclusive power not only of alteration, and of discontinuance, but to make and enforce reasonable regulations for their use. Nor do the facilities thereby afforded for transportation of the mails confer extraordinary rights upon mail carriers to use the ways as they please, or necessarily, or impliedly do away with the power of supervision and control inherent in the state. *Commonwealth v. Breakwater Co.*, 214 Mass. 10, 100 N. E. 1034; *Postal Telegraph Cable Co. v. Chicopee*, 207 Mass. 341, 350, 93 N. E. 927, 32 L. R. A. (N. S.) 997; *Dickey v. Turnpike Co.*, 7 Dana (Ky.) 113; *Searight v. Stokes*, 3 How. 151, 11 L. Ed. 537; *Price v. Pennsylvania R. R.*, 113 U. S. 221, 5 Sup. Ct. 427, 28 L. Ed., 980; *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; *Martin v. Pittsburg & Lake Erie R. R.*, 203 U. S. 284, 27 Sup. Ct. 100, 51 L. Ed., 184, 8 An. Cas. 87."

Certainly if a United States mail carrier using a post road is subject to police regulation enacted by the state or one of its civil subdivisions, any other person *a fortiori* is likewise restricted in his use of the highway regardless of the fact that it may be a

post road constructed under the provisions of the Federal Aid Act. While the *Closson* case is not authority upon the question of tolls, it is instructive, we think, upon the question of the true nature of the relationship between the state and the nation in the maintenance, operation and regulation of federal aid roads.

In *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, the court considered the validity of a tax of \$5.00 per pole levied upon the telegraph company by the city of St. Louis for the privilege of occupying city streets. The court said that the imposition was not a privilege tax, but a toll or rental for the use of property belonging to the city. It was urged that by virtue of a certain act of Congress granting telegraph companies accepting its privileges, the right to construct, maintain and operate lines of telegraph over post roads, the city could not without violating the provisions of that act, impose the \$5.00 fee for the privilege of occupying its streets. In speaking of the nature of the rights of the company the supreme court said:

"It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a state."

The decision points out that under the act, private property of an individual could not be appropriated without compensation, that the same rule would apply to streets and highways which are public

property of the state. Under the rule of this case, the appellant, even if he had been granted a franchise by the federal government to operate as a common carrier over the Pacific Highway, could not do so without compensating the state for the use thereof, and submitting himself to the police regulations imposed by the state.

A similar question arose in *Western Union Telegraph Company v. Richmond*, 224 U. S. 160, in which it was again held that the right to use the soil of the streets or even post roads is not paramount to the right of city or state to impose regulations.

Both of these decisions make it clear that any claim to the unrestricted use of the highway under the so-called post roads acts is subject to the right of the state to dictate the terms and conditions of such use and require compliance with chapter 111 as amended.

By reference to the state statute requiring the payment of fees from auto transportation companies, it will be noted that these fees are not to be used in the construction or maintenance of highways but are designed and adjusted wholly for the purpose of covering the cost of supervision and regulation of the auto transportation companies operating under the state laws. We submit to the court that the fees required under this act are in no sense a toll as that term is used in the federal statutes cited by us but are rather in the nature of inspection fees to cover the cost of enforcing proper police regula-

tions of the state. Such inspection fees have been sustained by this court in many cases.

*Patapsco Guano Co. v. N. Carolina*, 171 U. S. 345;

*McLean v. Denver & Rio Grande*, 203 U. S. 38;

*Pure Oil Co. v. Minnesota*, 248 U. S. 158.

We, therefore, urge upon this court that appellant's claim to a vested right to operate upon federal aided highways and his further claim that the regulatory fees required by the state statute constitute a violation of the toll prohibitions of the federal highway acts are without foundation in law and that the decision of the district court in this respect should be affirmed.

## II.

### THE STATE ACT DOES NOT VIOLATE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The appellant in his amended bill of complaint alleges that chapter 111, *supra*, and the action of the director of public works in refusing him a certificate to operate under said act are violative of section 8, article I of the constitution of the United States. Appellant has alleged a willingness to comply with all the provisions of the statute referred to and as set forth in our motion to dismiss, we believe he is estopped from urging the unconstitutionality of the state law. His real grievance is evidently not against the act itself but arises from his failure to obtain permission to operate under the act. It is difficult

to discuss seriously any of his contentions regarding the unconstitutionality of the act for this reason, but assuming, for the sake of argument, that he is entitled to urge such unconstitutionality, we will proceed to consider the state act in relation to the commerce clause of the United States constitution.

Appellant's amended bill of complaint is found on pages 1 to 11, inclusive, of the transcript. Paragraphs 1 to 5, inclusive, contain the necessary allegations relative to citizenship of the parties and plead the federal highway statutes hereinabove referred to, and the state statutes relative to licensing of automobiles and automobile drivers. Paragraph 6 summarizes the provisions of chapter 111, Laws of Washington 1921, as amended by chapter 79, Laws of Washington 1923. Paragraph 7 alleges that under chapter 111, *supra*, the respondent has issued certificates of convenience and necessity to the following operators in the territory named over the Pacific Highway:

Park Auto Transportation Company, between Seattle and Tacoma.

Thompson-Smith Company, between Tacoma and Olympia.

Northwestern Transportation Company, between Olympia and Kelso.

Camas Stage Company, between Kelso and Portland.

That no certificate has been issued for through transportation between Seattle or Tacoma and Portland, and the southern boundary line of Washington. There are further allegations regarding the use of

the Pacific Highway by the above named certificate holders, the character of busses and the character of service rendered by them, and that the appellant, if granted a certificate, will not use any larger or heavier busses or use the Pacific Highway to take on or discharge passengers or cause any hindrance to traffic or inconvenience to the traveling public. Paragraph 8 contains allegations relative to experience and ability of the appellant in auto transportation business. Paragraph 9 alleges that appellant has a certificate to operate in Oregon and has filed with the Oregon commission a schedule of rates and service. Paragraph 10 alleges that appellant applied to the respondent for a certificate under said chapter 111 and tendered compliance with all of the state statutes relative to operation of motor vehicles, including said chapter 111, and that his application for such certificate was denied by respondent in June, 1923, upon the grounds that the four certificate holders and the present railroad service between Seattle and Tacoma and Portland furnished adequate transportation to the public and that the appellant did not show sufficient financial ability. It is alleged that plaintiff is financially able. Paragraph 10 concludes with the following allegation:

"That by reason of the said action of the said defendant, this plaintiff has not been and will not be able to comply with any other provision of Chapter 111, as amended, as defendant herein has refused to and will continue to refuse to permit the plaintiff so to do and said denial of said certificate was not based upon the refusal of plaintiff to comply with



any provisions of the laws or rules and regulations of the department as plaintiff had complied so far as he has been permitted so to do by said defendant with all laws, rules and regulations. Further, this plaintiff is ready, willing and able and agrees to and will conform to and comply with all of the provisions of chapter 111, as amended, and the rules and regulations of the Department of Public Works of the State of Washington, regulating the equipment and the operations of motor vehicles on the Public Highways as specifically set forth in the said clause of the said application as herein above set forth."

Paragraph 11 alleges that unless granted a certificate he will lose his Oregon rights. Paragraph 12 is as follows:

"The plaintiff says further, that the railroad fare between the Cities of Seattle, Washington, and Portland, Oregon, is \$6.58, and the fare by the said local stages between the said points is \$6.85; the railroad fare between Tacoma, Washington, and Portland, Oregon, is \$5.21, and the fare by said stages between said points is \$5.85, that the fare filed by plaintiff as hereinbefore set out saves the traveling public large sums of money, all of which reduces the cost on interstate commerce.

"That the said action of the said Director in refusing to permit the operation in said interstate commerce directly burdens said commerce as the same is prohibited and the traveling public suffers thereby.

"The plaintiff says further, that the provisions of said law, Chapter 111, of the Session laws of 1921, compelling the *the* plaintiff to obtain a certificate or license to engage in interstate commerce and vesting sole jurisdiction or authority in the Director of Public Works to grant or refuse such certificate, but restricting one certificate holder in the same territory, as well as the acts of the defendant in denying the certificate or license to operate motor propelled vehicles, engaged wholly in interstate commerce, be-

tween Seattle, Washington, and the southern boundary line of Washington at Vancouver, over and along the same Public Highways, which have received Federal aid as are now operated over by 4 certificate holders restricted to intrastate commerce, and to be regulated by the same laws, rules and regulations as regulate the said 4 certificate holders; take plaintiff's property without due process of law, destroy his privileges and immunities to engage in interstate commerce, not only in the State of Washington but also in the State of Oregon, have created a monopoly on Federal Aided Interstate Public Highways, have violated the contract made by the State under the provisions of which it has received Federal aid, discriminate against interstate commerce on such Public Highways in favor of Intrastate commerce, and prohibit interstate commerce to be carried on under the same laws, rules and regulations of the state of Washington as are applied to and under which intrastate business is now carried on on said Public Highways, all of which are contrary to and in contravention of the constitution of the United States, especially the 14th Amendment thereof and article 1, section 8 thereof, the protection of which Constitution the plaintiff prays."

There is no Paragraph 13 and Paragraphs 14, 15 and 16 allege that if an injunction is not granted, appellant and his agents will be arrested for operating without a certificate; that the matters involved exceed \$3,000.00 in value and a prayer for the issuance of a preliminary injunction and upon a final hearing, a permanent injunction, and that said chapter 111 "relating to and compelling the obtain—of a certificate in order to operate motor propelled vehicles engaged in interstate commerce be declared void and unconstitutional." It will be noted that

appellant's only serious objection to the act as set forth in his amended complaint has reference to the requirement of a certificate of convenience and necessity prior to engaging in the operation of motor vehicles for compensation, and that he does not object to the other provisions of the act relative to liability insurance, fees, etcetera. In any event, the appellant, not having obtained a certificate and not having been required to furnish any liability insurance or pay any fees and being willing to comply with all the provisions of the act, would not at this time be in a position to object to any provision other than the one relating to the issuance of a certificate. We are confining our discussion of the act therefore, to that portion objected to by appellant.

Chapter 111, laws of Washington for 1921 is entitled:

"An act providing for the additional supervision and regulation of the transportation of persons, and property for compensation over any public highway by motor propelled vehicle: Defining transportation companies and providing for additional supervision and regulation thereof by the public service commission, providing for the enforcement of the provisions of this act and for the punishment of the violations thereof."

Section 1 of the act consists of definitions, subdivision (d) of which defines auto transportation companies as follows:

"The term 'Auto Transportation Company' when used in this act means every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controll-

ing, operating or managing any motor propelled vehicle not usually operated on or over rails used in the business of transporting persons, and, or, property for compensation over any public highway in this state between fixed termini or over a regular route, and not operating exclusively within the incorporated limits of any city or town; \* \* \*

Section 2 provides:

"No corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, shall operate any motor propelled vehicle for the transportation of persons, and, or, property for compensation on any public highway in this state, except in accordance with the provisions of this act."

Section 3 places auto transportation companies under the jurisdiction of the public service commission which is now the Department of Public Works, of which department respondent is director, and gives said department full power to supervise and regulate such companies and to prescribe rules and regulations therefor. Section 4, which is the section particularly objected to by appellant, provides:

"No Auto Transportation Company shall hereafter operate, for the transportation of persons, and, or, property for compensation between fixed termini, or over a regular route in this state, without first having obtained from the Commission under the provisions of this act a certificate declaring that public convenience and necessity require such operation; but a certificate shall be granted when it appears to the satisfaction of the commission that such person, firm, or corporation was actually operating in good faith over the route for which such certificate shall be sought on January 15th, 1921. Any right, privilege, certificate held, owned or obtained by an auto

transportation company may be sold, assigned, leased, transferred or inherited as other property, only upon authorization by the Commission. The Commission shall have power, after hearing, when the applicant requests a certificate to operate in a territory already served by a certificate holder under this act, only when the existing auto transportation company or companies serving such territory will not provide the same to the satisfaction of the Commission, and in all other cases with or without hearing, to issue said certificate as prayed for; or for good cause shown to refuse to issue same, or to issue it for the partial exercise only of said privilege sought, and may attach to the exercise of the rights granted by said certificate to such terms and conditions as, in its judgment, the public convenience and necessity may require."

In connection with the latter part of this section, it will be noted that the Department of Public Works, in denying a certificate to appellant, did so upon the ground that the territory was already served by certificate holders under this act, together with railroad companies. No question of the issuance of a certificate by reason of good faith operation on January 15th, 1921, is involved in this case. Section 5 relates to liability and property damage insurance; sections 6 and 7 to procedure before the commission and appeal therefrom to the courts, and penalties for violations of the act. Section 8 provides:

"Neither this act nor any provision thereof shall apply or be construed to apply to commerce with foreign nations or commerce among the several states of the Union except in so far as the same may be permitted under the provisions of the Constitution of the United States and the Acts of Congress."

Section 9 relates to fees and has been amended by section 1 of chapter 79, laws of 1923, and as amended is set forth in full on page 23 of this brief. Section 10 provides that partial invalidity shall not affect the remaining portion of the act, and section 11 provides that the act shall not repeal any existing laws relating to motor vehicles.

It has been repeatedly recognized by this court that in matters affecting interstate commerce the states may legislate with reference to local needs where there has been no congressional legislation with respect thereto. The declaration of this principle is clearly expressed by Mr. Justice Hughes in the *Minnesota Rate Cases*, 230 U. S. 352, 402; 57 L. ed. 1511, 1542. Other cases to this same effect are:

*Missouri Pacific Railway Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 623; 53 L. Ed. 352, 361;

*Atlantic Coast Line v. Georgia*, 234 U. S. 280, 290; 58 L. Ed. 1312, 1317;

*Missouri Kansas and Texas Railway Co. v. Harris*, 234 U. S. 412, 416; 58 L. Ed. 1377, 1381;

*Hendrick v. Maryland*, 235 U. S. 610, 622; 59 L. Ed. 385, 391;

*Kane v. New Jersey*, 242 U. S. 160; 61 L. Ed. 222;

*Chicago, Milwaukee and St. Paul Railway Co. v. Public Utilities Commission*, 242 U. S. 333, 336; 61 L. Ed. 341, 347;

*Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, 29; 64 L. Ed. 434, 442.

Congress has passed no act relative to interstate transportation by motor vehicles and it has been held in numerous cases that legislation of the character of chapter 111, *supra*, is of local nature, therefore, until Congress occupies this field by comprehensive national legislation, the act of the Washington legislature is valid.

It has also been repeatedly recognized by this court and the lower federal courts, that the states may, under their police power, pass acts which indirectly affect interstate commerce, and that the regulation and use of the public highways of the state is a proper exercise of the police power. This right to pass legislation affecting interstate commerce in the absence of congressional legislation and under the police power to regulate the use of the highways, is most clearly set forth in the case of *Hendrick v. Maryland*, *supra*, as follows:

“In the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horse-power of the engines—a practical measure of size, speed, and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the states and essential to the preservation of the



health, safety, and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce. The reasonableness of the state's action is always subject to inquiry in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress."

While a number of states now have legislation similar to chapter 111, *supra*, requiring certificates for auto transportation companies, so far as we have been able to discover there have only been, in addition to the instant case, eight cases in which this question of the effect of a state statute on interstate commerce has been in issue. In every one of these cases the state courts, United States District courts and this court have held that such regulation of motor vehicle transportation was a valid exercise of the police power of the state and was not in violation of the commerce clause of the United States constitution. Two of these cases were in this court. The *Hendrick v. Maryland*, *supra*, case had to do with an act of the state of Maryland (chapter 207, laws of Maryland 1910, p. 177), prescribing a comprehensive scheme for licensing and regulating motor vehicles. The *Hendrick* case was followed in the case of *Kane v. New Jersey*, *supra*, dealing with a similar act of the state of New Jersey (Public Laws of New Jersey, 1908, p. 613).

The Washington law herein involved was attacked upon this same ground in the case of *Interstate Motor Transit Co. v. Kuykendall*, 284 Fed. 882. The objection that the act was a burden upon inter-



state commerce was disposed of by the District court of Washington, Northern Division, in that case, in the following language:

"The state of Washington has expended and is expending many millions of dollars for the construction and reconstruction of highways within its boundaries. The act in question, and the acts of the state of which it is supplementary, provide for a comprehensive system of highways, and for the regulation of motor and other vehicles operating thereon. Among the powers granted to the national government is the regulation of interstate commerce. Article 1, section 8, Const. While Congress has exercised this power in a variety of acts, it has not done anything which in any way takes from the state the control of the highway within its boundaries, and the right to charge a reasonable compensation for the privilege of driving motor vehicles thereon.

"(2) The fact that interstate commerce may be affected by state legislation, is not in conflict with the Constitution, if made common to all, and is a reasonable regulation. It was so held in *Transp. Co. v. Parkersburg*, 107 U. S. 691, 2 Sup. Ct. 732, 27 L. Ed. 584, where a state constructed wharves along the banks of its navigable rivers, which were used for commerce between the states, and charged wharfage fees for the privilege of receiving and landing passengers and freight thereon; in *Huse v. Glover*, 119 U. S. 543, 7 Sup. Ct. 313, 30 L. Ed. 487, the construction of locks in navigable rivers and a reasonable charge for tolls for using such locks while engaged in interstate commerce was upheld; and the construction of booms for the purpose of increasing the facilities of floating, gathering and booming logs in navigable waters, and a reasonable charge made therefor was upheld in *Lindsay & Phelps v. Mullen*, 176 U. S. 126, 20 Sup. Ct. 325, 44 L. Ed. 400.

"(3) Clearly the purpose of the act in question was not to regulate interstate commerce. Any

one, so far as the act is concerned, may carry passengers for hire from California or Oregon to Washington, or from Washington to Oregon or California. It is only when a party so engaged seeks to appropriate the highway of the state, and this may not be done without the permission of the state. *G. T. W. Ry. Co. v. South Bend*, 227 U. S. 544, 33 Sup. Ct. 303, 57 L. Ed. 633, 44 L. R. A. (N. S.) 405; *Seaboard Air Line Co. v. Raleigh*, 242 U. S. 15, 37 Sup. Ct. 8, 61 L. Ed. 121."

The court then continues with citations from *Kane v. New Jersey*, *supra*, and *Hendrick v. Maryland*, *supra*.

After the *Interstate Motor Transit Company* case was decided, this same act was attacked in the state courts and was upheld by the Supreme court of Washington in the case of *Northern Pacific Railway Co. v. Schoenfeldt*, 123 Wash. 579, 213 Pac. 26, in an *en banc* decision rendered February 15, 1923. The *Schoenfeldt* case was followed by our state court in the case of *State, ex rel. Schmidt v. Department of Public Works*, 123 Wash. 705, 213 Pac. 31. In the *Schoenfeldt* case, after summarizing the provisions of the statute and stating the rule governing state action affecting interstate commerce as set forth in 12 Corpus Juris 12, the court observes, on page 585:

"The purpose of the act under consideration is clearly apparent from its title and contents, and that purpose is to regulate the use of the highways of the state by those engaged in carrying on business thereon for their own private gain, whether engaged in interstate or intrastate commerce, and it applies alike to each class without discrimination.

"We have repeatedly held that the legislature may regulate the use of the highways for carrying on business for private gain, and that such regulation is a valid exercise of the police power. *State v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 156 Pac. 837; *Allen v. Bellingham*, 95 Wash. 12, 165 Pac. 18; *Hadfield v. Lundin*, 98 Wash. 657, 168 Pac. 516, Ann. Cas. 1918C 942; and *State ex rel. Schafer v. Spokane*, 109 Wash. 360, 186 Pac. 864. \* \* \*

"We therefore hold that the act in question is a valid police regulation and as such is binding upon all who use the highways for the purpose of private gain, unless it is a constitutional burden upon those engaged in interstate commerce. \* \* \*

After quoting from *Hendrick v. Maryland*, *supra*, and *Kane v. New Jersey*, *supra*, the court continues:

"The act of 1921, to paraphrase the language of Mr. Justice Hughes, above quoted, is a protective measure of a reasonable character in the interest of the safety and welfare of the people of this state—safety, because by the terms of the act the highways may not be used for private gain unless in the judgment of the department of public works, after a full hearing, such use will tend to the convenience or serve the necessities of the public, and unnecessary congestion with its attendant dangers be thereby prevented. Welfare, because the highways are built and maintained at great expense and all traffic thereon is to some extent destructive, therefor the prevention of unnecessary duplication of auto transportation service will lengthen the life of the highways or reduce the cost of maintenance. The revenue to be derived by the state under the terms of the act will also tend toward the public welfare by producing, at the expense of those operating for private gain, some small part of the cost of repairing the wear and deterioration which they by their operations occasion.

"We conclude that no feature of the act is a prohibition of, or a direct burden upon, interstate commerce.

"But it is contended that section 8 of the act specifically includes such operations as are here shown. So far as it is necessary to construe that section, we think it clearly prospective, enacted with a view to a possible future time when Congress may assert its right to regulate and control such transportation; that it was inserted for the purpose of strengthening the act, and not to limit it, except as the courts might hold that Congress had by proper legislation assumed jurisdiction."

The Supreme court of Oregon, in the case of *Camas Stage Co. v. Kozar*, 209 Pac. 95, upheld the Oregon motor vehicle law, chapter 371, General Laws of Oregon 1921, as against the contention that it was a violation of the commerce clause. The Circuit court of Appeals of Maryland upheld the statutes of that state giving the Public Service Commission power to issue certificates of convenience similar to the Washington act involved in this case, in the case of *Geo. W. Bush & Sons Co. v. Maloy*, 123 Atl. 61. The language of the Maryland court, on page 64, is pertinent:

"If the contention of the appellant be correct, that the attempted regulation of the use of the highways of this state by the Public Service Commission under the statute mentioned is unconstitutional and void when applied to the appellant and others who apply for permits to engage in the transportation of freight and merchandise from points in this state to points in some other state, then there are no regulations of the use of the highways, nor can there be any until Congress sees fit to pass them, and this it may never do. If it does not, these valuable

highways of the state will be subject to the use of motor vehicles of all sizes and character by the persons mentioned. This should not be, and in our opinion is not, the law. But, as we have said, this case is controlled by the principles laid down in the Minnesota Rate Cases, and until Congress passes some legislation regulating the use of said highways, by the instrumentalities here mentioned, the right to do so, within the limitations mentioned in those cases, is lodged with the Legislature of this state."

In the case of *Liberty Highway Co. v. Michigan Public Utilities Commission*, 294 Fed. 703, the District court for the Eastern District of Michigan, Southern Division, upheld the Michigan Motor Vehicle Act (Public Acts of Michigan, 1923, No. 209). This act is similar in its general character to chapter 111, *supra*. With reference to the commerce clause the court observes, on page 707:

"The commerce clause of the federal Constitution does not, however, deprive the states of the right to reasonably regulate under their police power the use of their public highways, and to that end to require a license and impose a reasonable charge therefor, for the privilege of such use, even if thereby interstate commerce is incidentally affected, provided that such regulation, license, and charge bear a reasonable relation to the safe and proper maintenance and protection of such highways, do not obstruct or burden interstate commerce, and are not in conflict with federal legislation on the same subject enacted within constitutional limitations."

We fail to see how appellant derives any comfort from the case of *Carlsen v. Cooney*, 123 Wash. 441, as that case simply held that a transfer company which did not operate on a schedule or between fixed ter-

mini did not come within the provisions of chapter 111, Laws of 1921, and that such a person could operate over a route served by a certificate holder. Furthermore, in this case the supreme court of Washington has interpreted chapter 111, Laws of 1921, not as a prohibitory measure, but as a regulatory one, as evidenced by the following language:

"Looking to the language of the title of the act, it seems plain to us that it evidences an intent to regulate rather than prohibit; and when we look to the whole of the body of the act with a view of harmonizing its provisions with what seems so clearly expressed in its title, we are prone to believe that the legislature intended nothing more than to provide for the regulation of the transportation business by motor propelled vehicles over the public highways of the state 'between fixed termini or over regular routes;' \* \* \*"

We ask the court to consider the conditions which will arise if it should be held that the provisions of the state auto transportation act relative to certificates of convenience and necessity do not apply when an application is made for interstate operation but that such operation may be engaged in by auto transportation companies without complying with the provisions of the state act. There are, at the present time, a considerable number of auto transportation companies operating in this state in interstate service under such certificates. These operators would cease to be under the supervision and regulation of the department of public works. Many other auto transportation companies now engaged wholly in intrastate service could, at little addi-

tional cost and inconvenience, extend their service across the state lines and in like manner take themselves out of the jurisdiction of the department. Numerous others desiring to engage in what would appear to them to be a profitable field of endeavor would immediately inaugurate interstate service. Practically the entire state of Washington could be covered by auto transportation passenger and freight service from Portland, Pendleton and other Oregon cities, Lewiston, Moscow, Coeur d'Alene and other Idaho cities and numerous towns along the Canadian border. In like manner Oregon and Idaho could be served by auto transportation companies operating out of Washington towns. The result would be an increase in auto transportation service far in excess of the needs of the public; a great additional burden upon the highways, federal aided, state and county; increased danger to the traveling public upon such highways. There would soon be cutthroat rate competition followed by a decrease in efficiency of service to the ultimate detriment of the public welfare. Chaos and confusion in auto transportation would be the inevitable result. In other words, if the auto transportation act is not a proper exercise of the police power of the state as to those desiring to engage in interstate operation, the state is practically powerless to protect the safety and welfare of its people during the period when Congress has failed to provide for national regulation of auto transportation. We feel sure that the state statute and the



powers conferred thereunder upon the department of public works are a valid exercise of the police power of the state.

Inasmuch as all of the courts, state and federal, which have had occasion to consider the effect upon interstate commerce of state statutes regulating motor vehicle transportation, have sustained the state acts as not placing a burden upon interstate commerce and as being a valid exercise of the police power of the state in the absence of congressional legislation, we believe that the District court, in the instant case, should be affirmed.

### III.

#### THE STATE ACT DOES NOT VIOLATE THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

Appellant contends that the state act in question deprives him of property without due process of law, destroys his privileges and immunities to engage in interstate commerce, and creates a monopoly on Federal Aided highways, discriminates against interstate commerce and prohibits such commerce to be carried on under the same laws, rules and regulations as applied to intrastate commerce. For the reasons set forth in our motion to dismiss and referred to under the second heading above, we do not believe that appellant is entitled to contend that chapter 111 violates the fourteenth amendment, but assuming, for the sake of argument, that the ques-



tion is properly before this court, we shall endeavor to show that the act is entirely consistent with that amendment.

We have shown in the cases cited in the preceding heading, that the regulation of the highways is a proper exercise of the police power of the state. The particular reasons which not only justify but make it necessary for the regulation of the use of highways by motor propelled vehicles have been repeatedly set forth by the courts. We will not burden the record with innumerable citations to this effect, but will quote two typical cases:

In *Hendrick v. Maryland*, 235 U. S. 610, 622, 59 L. Ed. 385, 390, Mr. Justice McReynolds says:

"The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends on good roads, the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the states for better facilities, especially by the ever-increasing number of those who own such vehicles. As is well known, in order to meet this demand and accommodate the growing traffic the state of Maryland has built and is maintaining a system of improved roads. Primarily for the enforcement of good order and the protection of those within its own jurisdiction the state put into effect the above described general regulations, including requirements for registration and licenses. A further evident purpose was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential, and whose operations over them are peculiarly injurious."

In the case of *Geo. W. Bush & Sons Co. v. Maloy*, 123 Atl. 61, 63, the court stated:

"A statutory regulation of this character is essential not only to the protection of the above-mentioned highways built at great expense to the state and counties, but also to the safety of the public who travel upon them. The roads and highways are subject to great damage and injury when used by very large motor vehicles equipped without regard to the effect their use will have upon the roads, and, of course, the injury or damage is greater when large numbers of them are operated thereon; consequently the number of them used for profit and gain in the transportation of freight or passengers should be restricted to the public need or convenience, and, when the number is in excess thereof, their use becomes prejudicial to the welfare and convenience of the public. The operation of motor trucks upon these highways in most, if not all, cases is a great convenience to the public, especially to those persons living along the route on which they are operated. It is therefore important that the use of the highways shall be so regulated as to assure the enjoyment of this right to the public, which right may be seriously affected by the failure of those to whom the privilege is granted to give proper service, caused by their inability to operate with a profit, resulting from the excessive number to whom such privilege is granted. The object and purpose of the act is to restrict to the needs of the public the number of motor vehicles used in the transportation of freight or merchandise upon any one route, and thereby avoid the additional injury and damage to the roads or highways, and the danger to persons traveling thereon, that would result from the use of a greater number than the needs and convenience of the public require. It must be that the safety of the traveling public is lessened by the increased number of motor trucks operating upon the roads."

A proper exercise of the police power by a state does not contravene the fourteenth amendment. With reference to the contention that the motor vehicle law of Oregon is violative of the fourteenth amendment, the Supreme court of that state, in the case of *Camas Stage Co. v. Kozier*, 209 Pac. 95, 98, observes:

"The plaintiff invokes the protection of the Fourteenth Amendment to the Constitution. That amendment does not offer the plaintiff a refuge from the demands of the Motor Vehicle Law, which is an enactment within the police power of the state.

"The Supreme Court of the United States has frequently declared that the limitations contained in the Fourteenth Amendment were not designed to limit, or in any way interfere with the state's exercise of its police power. *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *Jones v. Brim*, 165 U. S. 180, 17 Sup. Ct. 282, 41 L. Ed. 677; *L'Hote v. New Orleans*, 177 U. S. 587, 596, 20 Sup. Ct. 788, 44 L. Ed. 899; *Lochner v. New York*, 198 U. S. 45, 53, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133.

"In *Barbier v. Connolly*, *supra*, Mr. Justice Field wrote:

"'But neither the amendment, (Fourteenth Amendment)—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.'"

The courts have repeatedly held that no one has the right to use the public highways of the state as a common carrier and that under the police power right to regulate the use of such highways,

their use by common carriers may be restricted or even entirely prohibited. The right to use the public highways is held to be a privilege and not an absolute property right.

In the case of *Schoenfeld v. City of Seattle*, 265 Fed. 726, 731, the district court for the Western District of Washington, in a case involving the validity of a jitney ordinance of the City of Seattle, stated:

"The plaintiff purposes to utilize the public streets of the city for a special purpose and private gain, a right not common at all. As to such the Washington court in *Allen v. Bellingham*, *supra*, said 'The power of the city as to such users of the streets is entirely plenary,' and quoted with approval from *Ex parte Dickie*, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840, 'The power or right to use the street may be wholly denied'."

In the case of *Lutz v. City of New Orleans*, 235 Fed. 978, 981, the District court for the Eastern District of Louisiana, in a case involving a jitney ordinance of the city of New Orleans, stated:

"Plaintiffs, however, do not pretend to have a franchise to use the streets, but rely upon their general rights as inhabitants of the city. It is settled that the Fourteenth Amendment does not create any right in a citizen to use the public property in defiance of the laws of the state. *Davis v. Massachusetts*, 167 U. S. 43, 17 Sup. Ct. 731, 42 L. Ed. 71. No one has the vested right to make the use of the streets of the city the basis of his business, such as a common carrier, regardless of what may be his rights as a citizen to otherwise use them. Statutes regulating common carriers may go to great lengths without being confiscatory. Rates and schedules may be

regulated, and the absolute liability of insurers, regardless of negligence, may be imposed."

The Supreme court of the state of Washington, in the case of *Hadfield v. Lundin*, 98 Wash. 657, 660, in considering chapter 57, Laws of Washington 1915, regulating jitneys, stated:

"The streets and highways belong to the public. They are built and maintained at public expense for the use of the general public in the ordinary and customary manner. The state, and the city as an arm of the state, has absolute control of the streets in the interest of the public. No private individual or corporation has a right to the use of the streets in the prosecution of the business of a common carrier for private gain without the consent of the state, nor except upon the terms and conditions prescribed by the state or municipality, as the case may be. The use of the streets as a place of business or as a main instrumentality of business is accorded as a mere privilege and not as a matter of natural right."

In the case of *Ex parte Dickie*, 85 S. E. 781, 782, the Supreme Court of Appeals of West Virginia, in construing an ordinance of the City of Huntington regulating jitney busses, stated:

"The right of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a common right, a right common to all, while the latter is special, unusual, and extraordinary. As to the former, the extent of legislative power is that of regulation; but as to the latter, its power is broader. The right may be wholly denied, or it may be permitted to some and denied to others, because

of its extraordinary nature. This distinction, elementary and fundamental in character, is recognized by all the authorities."

The same court again, in the case of *Carson v. Woodram*, 120 S. E. 512, 513, in construing an act of the state of West Virginia, regulating automobile transportation within that state (chap. 112, Acts of West Virginia 1921), stated:

"The power of the Legislature to so regulate the use of the public roads, highways, and streets and alleys in incorporated cities and towns, of this state is clearly justified as proper exercise of the police power.

"The right of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a right common to all, while the latter is special, unusual and extraordinary. As to the former, the extent of the legislative power is that of regulation; but as to the latter, its power is broader. The right may be wholly denied, or it may be permitted to some and denied to others, because of its extraordinary nature. *Ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781, L.R.A. 1915F, 840; *Ex parte Cardinal*, 170 Cal. 519, 150 Pac. 348, L. R. A. 1915F, 850; *Hadfield v. Lundin*, 98 Wash. 657, 168 Pac. 516, L. R. A. 1918B, 909, Ann. Cas. 1918C, 942; *Desser v. Wichita*, 96 Kan. 820, 153 Pac. 1194, L. R. A. 1916D, 246; *Huston v. Des Moines*, 176 Iowa, 455, 156 N. W. 883, L. R. A. 1916E, 524; *McQuillin Mun. Corp.* Sec. 1620.

"The use of the highways for the public transportation of freight and passengers belongs to the public. This use may therefore be completely regulated and controlled by the Legislature in the

interest of the public welfare. *Le Blanc v. New Orleans*, 138 La. 243, 70 South, 212; *New Orleans v. Le Blanc*, 139 La. 113, 71 South, 248; *Lutz v. New Orleans*, (D.C.) 235, Fed. 978." See also the case of *Nolen v. Riechman*, 225 Fed. 812.

It will be noted that section 6, chapter 111, *supra*, provides that any order of the Department of Public Works may be reviewed by the superior and the supreme courts of the state in the manner provided for in the Public Service Commission law. Such provisions for review will be found in sections 86 and 88, chapter 117, laws of Washington, 1911, being sections 10428 and 10430, Rem. Comp. Stat. Since the statute makes complete provisions for judicial review of any order of the department, granting or denying a certificate of convenience and necessity, the requirement for due process of law is fully satisfied.

We have shown in the first subdivision of this brief that under the Federal highway acts the regulation, supervision and control of such highways within the state is left to the state until such time as Congress otherwise provides. This being true and the state having under its police power the right to restrict or prohibit entirely the use of such highways by motor vehicles as common carriers, it is apparent that appellant had no property right to so use the highways and the provisions of section 4, chapter 111, *supra*, requiring him to obtain a certificate of convenience and necessity before so operating, together with the provision of section 6 that the



granting or denying of such certificate might be reviewed by the courts, clearly do not violate the provision of the fourteenth amendment that no state shall make or enforce any law which shall abridge privileges or immunities of citizens, nor deprive any citizen of life, liberty or property without due process of law.

Appellant's other contention relative to discrimination and monopoly, as being violative of the fourteenth amendment, would relate to the equal protection of the laws clause of that amendment. It has been repeatedly held that the legislature may delegate to an administrative department or officer the right to determine whether or not one is entitled to use public property or obtain a license to engage in business. In the case of *Davis v. Commonwealth of Massachusetts*, 167 U. S. 43, 42 L. Ed. 71, this court sustained an ordinance prohibiting any person from making public addresses on public grounds of the city without a permit from the mayor. The court observes:

"The assertion that although it be conceded that the power existed in the state or municipality to absolutely control the use of the Common, the particular ordinance in question is nevertheless void because arbitrary and unreasonable in that it vests in the mayor the power to determine when he will grant a permit, in truth, whilst admitting on the one hand the power to control, on the other denies its existence. The right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser. The finding



of the court of last resort of the state of Massachusetts being that no particular right was possessed by the plaintiff in error to the use of the Common, is in reason, therefore, conclusive of the controversy, which the record presents, entirely aside from the fact that the power conferred upon the chief executive officer of the city of Boston by the ordinance in question may be fairly claimed to be a mere administrative function vested in the mayor or in order to effectuate the purpose for which the common was maintained and by which its use was regulated. *Ex parte Kollock*, 165 U. S. 526, 536, 537 (41:813, 816,817). The plaintiff in error cannot avail himself of the right granted by the state and yet obtain exemption from the lawful regulations to which this right on his part was subjected by law."

In the case of *Gundling v. Chicago*, 177 U. S. 183, 198, 44 L. Ed. 725, 728, this court in construing an ordinance giving the mayor power to determine whether a person should receive a license to sell cigarettes, said:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference."

In the case of *New York ex rel. Lieberman v. Van De Carr*, 199 U. S. 552, 562, 50 L. Ed. 305, 311, this court after discussing numerous prior cases regarding this delegation of authority, stated:

"These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of rights secured by the 14th Amendment. There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual, under sanction of state authority, this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a Federal court."

The lower court in the instant case held that the delegation to the Department of Public Works of the authority in the statute was proper.

It is apparent therefore that the provision of chapter 111, *supra*, authorizing the Department of Public Works to determine whether public necessity and convenience require the issuance of a certificate to operate as an auto transportation company is not violative of the 14th Amendment.

Appellant contends that the provision for denying a certificate in the event the public is being adequately served by the present operators makes it possible to create a monopoly. On the contrary we contend that this is only a proper exercise of the police power of the state for the protection of the traveling public. The reasons for restricting the is-

suance of certificates to use the highways as common carriers are well expressed by the Supreme Court of Illinois in the case of *West Suburban Transportation Company v. Chicago and W. T. Ry. Co.*, 140 N. E. 56, 58:

“If the transportation facilities furnished by appellee are so inadequate as to subject the public to inconvenience, and the operation of appellant’s bus lines would eliminate that inconvenience, the order of the commission was authorized. It is not the policy of the Public Utilities Act to promote competition between common carriers as a means of providing service to the public. The policy established by that act is that, through regulation of an established carrier occupying a given field and protecting it from competition it may be able to serve the public more efficiently and at a more reasonable rate than would be the case if other competing lines were authorized to serve the public in the same territory. Methods for the transportation of persons are established and operated by private capital as an investment, but as they are public utilities the state has the right to regulate them and their charges, so long as such regulation is reasonable. The policy of the Public Utilities Act is that existing utilities shall receive a fair measure of protection against ruinous competition. Rates of fare charged for service are subject to regulation by the Commerce Commission within reasonable limits, but the commission has no power to make a rule or order regulating a utility which would amount to a confiscation of its property or require operation under conditions which would not provide a reasonable return upon the investment. Where one company can serve the public conveniently and efficiently, it has been found from experience that to authorize a competing company to serve the same territory ultimately results in requiring the public to pay more for transportation, in order that both companies may

receive a fair return on the money invested and the cost of operation."

The lower court in the instant case held that the power to grant a franchise to whom it will did not create a monopoly against law or public policy, citing in support of its decision the following authorities which fully sustain the lower court:

Cooley's Constitutional Limitations (7th Ed.)  
564;

*Haddad v. State*, 23 Ariz. 105, 201 Pac. 847;

*People v. Willcox*, 207 N. Y. 86, 100 N. E. 705,  
45 L. R. A. (N. S.) 629;

*Utilities Commission v. Garviloch*, 54 Utah  
406, 181 Pac. 272;

*Hadfield v. Lundin*, 98 Wash. 657, 168 Pac.  
516, L. R. A. 1918B, 909 Ann. Cas. 1918C,  
942;

*Allen v. Bellingham*, 95 Wash. 12, 163 Pac. 18.

It is evident that the statute does not discriminate between interstate and intrastate auto transportation companies as its requirements apply equally to all desiring to use the public highways for auto transportation and the statute in section 8 has expressly declared that it shall not apply to interstate commerce when Congress has made any legislation to the contrary. As to any other basis of classification the statute does not contravene the equal protection clause of the Federal Constitution. Several of the cases heretofore cited on other features of the fourteenth amendment have likewise held that such an act is not an improper classification and it is un-

necessary to further enlarge the brief by citations to innumerable decisions of the state courts construing jitney ordinances as not being violative of the fourteenth amendment, by reason of being improper class legislation. The reasoning of these jitney cases is equally applicable in the instant case.

In the case of *Liberty Highway Co. v. Michigan Public Utilities Commission*, *supra*, 294 Fed. 703, 709, the District court of Michigan, in construing the Michigan Act, very similar to the Washington Act involved here, stated:

"The statute is not class legislation because it applies only to common carriers operating over fixed routes. It is well known that commercial motor vehicle transportation, and highway maintenance expense resulting therefrom, is rapidly increasing; that traffic on main highways is greatly congested. It is not an unreasonable classification under the police power to make a distinction between those common carriers whose use of the highways is more regular, and hence more frequent, and whose operation on the highways is attended with greater danger to life and property, and greater damage to the highways and those carriers whose use of the highways is only occasional and spasmodic. Such a distinction does not constitute an arbitrary discrimination, it being settled that every state of facts sufficient to sustain a classification which can be reasonably conceived of as having existed when the statute was enacted will be assumed by the court."

In the case of *Lane v. Whitaker*, 275 Fed. 476, the District Court for the District of Connecticut had under consideration the Public Acts of Connecticut 1921, chapter 77, being an act concerning public service motor vehicles operating over fixed routes,

similar in many respects to the Washington Act involved in this case. Substantially all the objections to the act as being violative of the fourteenth amendment were urged in that case and the court held that the act was not in any respect violative of such amendment. The language of the court is very pertinent to this case:

“We think the several objections urged as to the constitutionality of the act are not well founded. As to the first, the claim is that, because the statute provides that all jitney busses are common carriers and shall be subject to the jurisdiction of the Public Utilities Commission, it discriminates against the plaintiffs. The citizen has the right of travel upon the highways, and may transport his property thereon in the ordinary course of life and business; but this is a very different thing than permitting the highway to be used for commercial purposes, as a place of business, for private gain, in running jitney busses. The right, common to all, to the use of highways, is the ordinary use made thereof: but where, for private gain, a jitney owner wants a special and extraordinary benefit from the highway, to use it for such commercial purpose, the Legislature may, in the exercise of its police powers, wholly deny such use or it may permit it to some and deny it to others, and this is because of the extraordinary nature of such use. And where the Legislature grants the permission to use the highway, it may do so under regulations which are common to all applicants. They may grant, refuse, or revoke the license, and in so doing the Legislature may permit of rules and regulations when such use is granted. This it has done in the act in question, by providing that a body created under the law (the Public Utilities Commission) may make such rules and regulations and grant such license when public convenience and necessity require it.

"It is essential that motor vehicles on the highway used for such purposes should do so with safety to the public, and that owners should contribute to the maintenance of the highways by such payments as may be required with such grant. In examining the act, we are satisfied that it is clear that the Legislature, in comprehensive terms, intended a regulation which is for the interest and convenience of the inhabitants of the localities which are on the proposed route. It left the granting or refusal of a license, and the regulations as to the sanitary conditions and safety of the public, with the Public Utilities Commission, and in conferring this power the Legislature kept well within the confines of its constitutional limitations."

In view of these numerous decisions of the courts it is clear that chapter 111, laws of Washington 1921, is not in any respect a violation of the equal protection clause of the Fourteenth Amendment of the Federal Constitution.

The decision of the lower court in this respect should therefore be affirmed.

#### IV.

#### THE DEPARTMENT OF PUBLIC WORKS PROPERLY DENIED APPELLANT A CERTIFICATE OF CONVENIENCE AND NECESSITY.

Appellant alleges in his bill of complaint not only that the statute is violative of the constitution but that the act of the respondent under the statute is also unconstitutional. We have endeavored to show in the preceding portions of this brief that the act itself is in all respects valid. It remains to determine whether or not the action of the Depart-



ment of Public Works, in denying appellant a certificate of convenience and necessity was a proper exercise of the power vested in said department by the statute.

The order of the department in denying said certificate is set forth in full in the case of *In Re Buck*, P. U. R. 1923E, 737. The findings of the department are summarized in detail by the lower court in *Buck v. Kuykendall*, 295 Fed. 197, 204. It is unnecessary to repeat here in any detail the department's findings. It is sufficient to say that an application was made to the department by the appellant for a certificate of convenience and necessity, under the act, for operations between Seattle and Tacoma, Washington, and Portland, Oregon. That a hearing was had before the Department of Public Works at which appellant was represented; that numerous protests against the granting of such certificate were filed with the department and protestants were heard; that the department found that the needs of the public regarding transportation between the points named were fully and adequately served by the three railroads and by the four auto transportation companies, and that there was no necessity for any further transportation between such points and that the appellant was not financially able to furnish such transportation and that the present carriers were ready, able and willing to furnish any additional transportation that public needs might require. The extent of the service now rendered the public for



transportation between these points is set forth in the affidavit of the respondent on pages 32 and 33 of the transcript.

We call the court's attention to the fact that no allegation is made in the bill of complaint that the action of the Department of Public Works in denying the certificate sought was unreasonable, arbitrary, capricious or fraudulent. Since due process of law was afforded by the public hearing before the department with the right of judicial review of the department's order in the Superior and Supreme courts of the state, it is apparent that if the statute itself is valid the act of the department must be accepted as a valid and proper act. In this connection we remind the court that this court and the lower Federal courts have repeatedly stated that findings of an experienced administrative tribunal such as the Department of Public Works, after a full hearing, are entitled to a strong presumption of correctness.

*R. R. Commission v. Cumberland Tel. & Tel. Co.*, 212 U. S. 414, 421, 423, 53 L. Ed. 577, 581;

*Darnell v. Edwards*, 244 U. S. 564, 569; 61 L. Ed. 1317;

*Minneapolis & St. Louis R. Co. v. Minneapolis, ex rel. R. R. & W. Commission*, 186 U. S. 257, 264; 46 L. Ed. 1151, 1156;

*S. P. Co. v. R. R. Commission*, 193 Fed. 699, 703;

*Tex. & P. Ry. Co. v. R. R. Commission*, 192 Fed. 280, 284;

*Louisville & N. R. Company v. R. R. Commission*, 208 Fed. 35, 40;

*Cumberland Tel. & Tel. Co. v. Louisiana Public Service Commission*, 283 Fed. 215, 217.

In view of all these conditions we do not see how the appellant has any right to challenge the validity of the department's action. However, we will discuss some of the allegations of the bill which relate to the merits of the controversy rather than the validity of the statute.

Appellant has applied for a certificate to operate as a common carrier for hire over the Pacific highway between Seattle and Portland. The Pacific highway is paved for the entire distance between these cities and is the main artery for motor vehicles, both private and common carriers. That the department is justified in restricting the use of such highways by automobile busses as common carriers to the actual needs of the traveling public, is clearly shown by the numerous citations heretofore made. The necessity for such regulations is more clearly apparent to the court from an examination of the opening statement of this brief. It will be noted that the travel is very heavy, with corresponding danger to the public and wear and tear on the public highway.

It is alleged in paragraph VII of the amended bill of complaint, that appellant does not intend to and will not stop on said highway to take on or dis-

charge passengers. This would seem to be an attempt to evade the repeated decisions of the courts that he has no inherent right to use the public highways for private business. It is evident, however, that he is using the public highway for business purposes when his motor vehicles are in motion over the highway itself and the fact that he will not use the highway as a terminal station does not take him from under the cases referred to or change the fact that he is attempting to use the public highways for business purposes.

Appellant emphasizes the fact that he desires certificate for through interstate transportation only. Of course his operations would be interstate if he operated from Vancouver, Washington, only, to Portland, and the operation is not made any more interstate in character by extending it to Seattle. The department's order shows that the comfort, and convenience of passengers on a long auto trip like that from Seattle to Portland would necessitate occasional stops and that the present system of operation by the four carriers having certificates, from Seattle to Tacoma, Tacoma to Olympia, Olympia to Kelso and Kelso to Portland, with joint auto depots with adequate rest rooms and facilities for the comfort and convenience of patrons, furnish better service than would be obtained by through transportation.

Appellant emphasizes, in paragraph XII of the bill of complaint, that he contemplates charging a

lower rate than is charged by the present rail and auto transportation companies. This allegation is wholly immaterial to the issues in this case. The present schedule of rates charged by the railroads and auto transportation companies has been in effect for some time and is on file with the Department of Public Works. It is to be presumed that it is reasonable and the statutes provide a means by which, if not reasonable, it may be challenged and its reasonableness determined. The question of the rates charged by the present operators and proposed by the appellant is not involved in this case. The language of the Supreme court of Illinois in the case of *West Suburban Transportation Co. v. Chicago and W. T. Ry. Co.* 140 N.E. 56, 58, in disposing of a jitney case in which the jitney operators had alleged that the fare charged was less than the fare charged by the street railroad company, is as follows:

"Some individuals — perhaps a considerable number — would be inconvenienced by the operation of the bus lines; but it is clear from the record that to the great body of the public it would be neither a convenience nor necessity. It was not within the authority of the commission to authorize the operation of the bus lines for the convenience of a small part of the public already served by other utilities at no very great inconvenience. The order appealed from stated the bus company proposes to operate its transportation facilities at a lower rate of fare than the public is now paying, and in appellant's brief it says the fare charged is 5 cents; but the order does not fix the rate of fare to be charged. Assuming appellant is limited to a 5 cent fare and appellee is charging a larger rate, that was not, of itself,

sufficient to authorize the order of the commission. The commission had authority to regulate the rate charged by the appellee, and if its fares were excessive to reduce them. Fares are not the only thing to be considered in a case of this kind. The public is interested and vitally concerned in adequate transportation facilities at reasonable rates, and the state is interested in assisting to get them; but the state cannot, as we have said, require a carrier to furnish service at a rate which will not pay a fair return on the investment and cost of operation. We are not advised that any complaint had ever been made to the commission that appellee is charging excessive rates, and so far as this case is concerned we will assume it is not doing so. The effect of authorizing the operation of the bus lines at a lower fare to serve the same territory would be to decrease appellee's revenues, and, if the rate it is now charging is a reasonable one, to require it to operate at a loss or increase its rate. This would be against the public interest, because appellant's lines cannot accommodate more than a comparatively small portion of the public in the matter of transportation."

## CONCLUSION.

In the preceding pages we have shown that the provisions of chapter 111, Laws of Washington 1921, as amended by chapter 79, Laws of Washington 1923, are not in contravention of the Federal Aid Act and Federal Highway Act either by an improper restriction upon the use of Federal Aid highways, or by the imposition of tolls for the use thereof. That said act is not in any respect in violation of the commerce clause of the United States Constitution and that said act is a valid exercise of the police power of the state and not in contravention of the fourteenth amendment of the Federal Constitution. It is further shown that the act of the Department of Public Works in denying appellant a certificate was a proper exercise of the authority lawfully conferred upon said department and not in violation of any of the Federal statutes or constitution. We therefore request this court to affirm, in all respects, the decision of the district court.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1924.  
No. 345.

A. J. BUCK, *Appellant*,  
*vs.*

E. V. KUYKENDALL, Director of Public Works of the  
State of Washington, *Appellee*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF WASHINGTON.

BRIEF FILED BY THE FOLLOWING STATE  
REGULATORY COMMISSIONS, APPEARING  
AS *AMICI CURIAE*.

Alabama Public Service Commission.  
Arizona Corporation Commission.  
Railroad Commission of the State of California.  
Public Utilities Commission of Colorado.  
Board of Railroad Commissioners of Iowa.  
Public Utilities Commission of Maine.  
Department of Public Utilities of Massachusetts.  
Board of Railroad Commissioners of Montana.  
Nevada Public Service Commission.  
New Hampshire Public Service Commission.  
Board of Railroad Commissioners of North Dakota.  
Public Utilities Commission of Ohio.  
Oklahoma Corporation Commission.  
Board of Railroad Commissioners of South Dakota.  
Public Utilities Commission of Utah.  
Virginia State Corporation Commission.  
Wyoming Public Service Commission.  
*Public Service Commission of Maryland*  
*Public Utilities Commission of Connecticut*  
BRIEF STATEMENT OF THE CASE.

The appellant desires to operate a line of motor vehicles between the cities of Seattle and Tacoma, in the

State of Washington, and Portland, in the State of Oregon, for the transportation of passengers for hire as a common carrier. The business is designed to be wholly interstate, no passengers being transported locally within the State of Washington. The route proposed to be passed over, within the State of Washington, is known as the "Pacific Highway," extending from Seattle to the Oregon boundary line at Vancouver, Washington, and was constructed or improved with federal aid, and in accordance with the provisions of the Federal Aid Act, enacted July 11, 1916, as amended by The Federal Highway Act, enacted November 9, 1921.

Chapter 111 of the Session Laws of 1921 of the State of Washington, as amended, provides full and comprehensive rules and regulations for the operation of motor vehicles on the public highways of Washington, including the requirement of license fees to be paid on each motor vehicle using the highway and by each motor vehicle operator. It is provided that no person may engage in auto transportation in that State without first obtaining from the Director of Public Works a certificate of convenience and necessity. Said law further provides that no certificate may be granted by said Director to operate in the same territory occupied by another certificate holder, unless the latter fails to obey the proper orders of said Director, and then only after a proper hearing. The appellee is the Director of Public Works in said State. The appellant applied to said Director for a certificate of convenience and necessity authorizing the operation of the applicant's proposed line of motor vehicles, and the same was refused.

The applicant then began this action in the United

States District Court for the Western District of Washington, asking that the appellee be enjoined from beginning any proceeding against him to enforce the penalties provided by Washington law for the operation of motor vehicles in auto transportation without procuring a certificate, as required by said Chapter 111 of the Session Laws of 1921, as amended. It was claimed that the provisions of said Chapter 111 amounted to a prohibition of interstate commerce, unlawful under the Commerce Clause of the Federal Constitution; and also that said Act of Congress of July 11, 1916, gave to the appellant a vested right to use said Pacific Highway, the same having been reconstructed with Federal aid.

The appellee filed his affidavit setting forth, among other things, that the Northern Pacific Railway Company, the Great Northern Railway Company, the Oregon-Washington Railroad & Navigation Company, and the American Railway Express Company are engaged in intrastate and interstate commerce and in the carriage of persons and property between the cities of Seattle, Washington, and Portland, Oregon, and intermediate points, said rail carriers furnishing freight, passenger and mail service, and said express company furnishing an express transportation service over the lines of said rail carriers, and that holders of certificates of convenience and necessity previously issued, authorizing them, respectively, to operate motor vehicles in auto transportation over designated portions of said Pacific Highway, had schedules so arranged, and bus stations so used in common, that persons desiring transportation by motor propelled vehicles interstate between Portland and points in the State of Washington along said Pacific Highway could obtain

continuous passage, and that said certificate holders were engaged in carrying passengers between said points in Washington and Portland and intermediate points.

Upon motion of the appellee the bill of the appellant was dismissed, and this appeal was thereupon taken.

The questions presented are the following:

1. In the absence of action by Congress, is it within the constitutional power of the State of Washington, in the regulation of the use of its highways, to prevent the operation of motor vehicles for common carrier purposes over such highway, until such operation has been found consistent with the public interest, and such finding has been evidenced by a certificate issued by the proper State authority.

2. Do the provisions of the Federal statutes providing for federal aid in the construction of post roads within the several states prevent such states, in the exercise of their powers to regulate the use, and provide for the maintenance, of their highways, from enforcing the payment of reasonable and non-discriminatory license fees by all persons using such highways, including such post roads, for motor traffic?

#### INTEREST OF STATE COMMISSIONS FILING THIS BRIEF.

The State commissions filing this brief exercise jurisdiction over the issuance of certificates of convenience and necessity for the operation of motor vehicles for common carrier purposes. They are interested in the decision that may be rendered herein because, if the appeal shall be sustained, the decision may affect their power to serve the public in their respective states in the manner provided by their laws. They

therefore file this brief, pursuant to leave of court, in support of the proposition that the judgment of the District Court should be affirmed.

### POINTS TO BE DISCUSSED.

The argument herein will be addressed to the following propositions:

1. In the exercise of their police powers, reserved to them under the Federal Constitution, the states may enact legislation in aid of the health, safety and general welfare of their citizens, even though the same may incidentally affect interstate commerce.

2. The legislation of the State of Washington, and the action of its Department of Public Works thereunder, constituted a reasonable and proper exercise of the State's sovereign power.

3. The Federal statutes providing for Federal aid to the states in the construction of post roads in no way conflict with such exercise of the State's power of regulation of its highways as is complained of in this case.

### PRELIMINARY DISCUSSION.

The sudden development of motor vehicles has been one of the most phenomenal of the economic developments of the last twenty-five years. In that short space of time the automobile and the motor truck have come into almost universal use for purposes both of pleasure and of business. Highways that were sufficient for horse-drawn vehicles are insufficient for motor vehicles, and the country has accordingly suddenly been covered with improved highways along the lines of densest traffic. The transformation has cost immense

sums of money, which in most states have in large part been raised by long time bonds. Aid has also been received from the Federal Government.

These highways are crowded with passenger automobiles and with motor trucks moving freight in private business; and more and more they are also sought to be used as ways for large trucks and motor buses operated as common carriers for the transportation of freight and passengers.

The multiplication upon the highways of heavy, high-powered vehicles, operated at high speed, produces conditions of danger which were unknown in the days of horse-drawn vehicles. And the intensive use to which they are put by such vehicles is destructive to the highways themselves. To enable the control of the traffic upon these highways in such manner as to permit of their maximum usefulness, and to ensure the safety of persons traveling thereon and the preservation of the highways from destruction by improper use makes necessary governmental regulation of motor vehicle operation both interstate and intrastate. This case presents the question whether the Federal Constitution disables the several states from supplying that regulation, as to interstate vehicles, and compels them to suffer the lack of it unless and until Congress shall legislate.

Every State has in fact passed laws regulating the operation of motor vehicles—statutes requiring the payment of fees designed to be used for highway maintenance, statutes requiring the licensing of operators, speed regulating statutes, maximum load statutes, statutes providing for night lighting and the like. Such requirements are examples of the exercise of that residuary power of sovereignty under which the vari-



ous states have been enabled to cope with developing social and economic conditions. particularly those which affect the health, safety and general welfare of their people.\*

One of the most difficult problems which has accompanied this development of motor transportation concerns the operation of automobiles and motor trucks as vehicles of common carriage for the transportation of persons and property for hire. Such operations first attained importance a few years ago when numbers of so-called "jitney-busses" suddenly appeared on city streets throughout the country. Later came "stages" of various types conveying travelers over the public highways from town to town, and in many states, particularly in the West, the development of such organized motor transportation has been enormous, not only for the carriage of persons, but also for the hauling of great quantities of manufactured goods and products of husbandry over regularly established routes at regularly established rates. The business has become one of large economic importance. Its similarity in legal aspect to the business of the "common carrier," familiar to the common law, is unmistakable. It has everywhere been recognized by the courts, and the control and regulation of this newly developed business by governmental authority, for the protection of the public interest, has been as inevitable as was the regulation of other types of enterprise closely affecting the public welfare, and at common

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\*As was said by Mr. Justice McKenna in the *Michigan Blue Sky Case* (*Merrick v. Halsey & Co.*, 242 U. S. 568; 61 L. ed. 498), while a written constitution places in unchanging form limitations upon legislative action, this "does not mean that the form is so rigid as to make government inadequate to the changing conditions of life, preventing its exertion except by amendments to the organic law."

law held to be "impressed with a public use," which have come under complete governmental regulation.

The regulation of motor vehicle operation both in private business and for common carrier purposes has come only through state legislation. In this respect the situation has been analogous to that which existed in the early history of our railroads. The first railroad in the United States was opened for operation in 1830. More than fifty years had passed, and the railroads had become a net work over the entire country, before the Federal Government exercised its predominant power to regulate them, as agencies of interstate commerce. This was not because there was no necessity for their regulation, but because such necessity first became manifest locally, and was met by state action. During this long period of non-exercise of regulatory power by the Federal Government, the states exercised powers of regulation which went far beyond those which they may now exercise, since Congress entered the field, and provided for the far-reaching regulation now exercised through the Interstate Commerce Commission.

The motor vehicle was first subjected to regulation for protection of public safety, and for the levying of taxes to provide funds for highway maintenance. The advent of the motor bus and the freight truck, operated as common carriers, has presented a difficult problem because it has brought a service which is of value to the public, which should accordingly be permitted a proper development, and yet it threatens the public with serious added dangers, both to the public safety, and to the preservation of the public highways. These are of such character that it is impossible to frame any statute which will permit such operation as is in the

public interest, and will yet prevent that which is detrimental to such interest.

Motor vehicles operated as common carriers, whether in passenger or freight service, are ordinarily more cumbersome and heavy, and carry greater loads, than privately operated vehicles. They therefore tend to overcrowd the highways, and to increase the hazards incident to travel thereon greatly out of proportion to the number of such vehicles, as compared with vehicles privately operated.

By reason of their weight, and the loads they carry, and the character of the service they perform, and the constancy of their operation, motor vehicles operated as common carriers injure the highways more than other vehicles.

Between large cities and through thickly settled communities, where the demand for transportation of freight and passengers is substantial, and where highly improved highways have been provided, the promise of financial profit from the operation of common carrier service by motor vehicles is such as naturally produces a great deal of competition, and the consequent crowding of large numbers of heavy busses and motor trucks upon highways already congested with privately operated motor vehicles. If no restriction is placed upon the operation of such common carrier vehicles, it is obvious that the number operated will exceed the public necessity therefor, and will thus subject the public to dangers that are unnecessary, and the public highways to useless wear and depreciation.

Furthermore it has been found that unrestricted competition in public utility service is not in the public interest, but results in duplication of investment, upon which a return is attempted to be obtained from

the public, resulting in higher rates than would be necessary but for such duplication. Also when competition becomes so intense that reasonable returns upon capital investment can not be realized the character of the service inevitably suffers in the end.

For all these reasons it is in the public interest that no more motor vehicle common carriers shall be operated than are necessary to meet the reasonable needs of the public.

It is essential in the public interest also, in determining the necessity for permitting the operation of such common carrier service by motor vehicles, that the extent to which transportation is already supplied by steam and electric lines shall be considered, and the effect of motor vehicle competition upon such lines, and upon their ability to serve the public efficiently.

The public interest in most of the several matters just mentioned can not be properly protected by statutes of general application. Each proposed operation must be considered under the circumstances that surround it. Regulation must accordingly be by an administrative official or board. It has usually been supplied by giving jurisdiction to the commission vested with regulatory power over other public service properties. Such is the form of regulation provided in the statute of Washington, the application of which to himself the appellant complains of.

One of the most important features of such regulation of common carrier vehicles ordinarily is the provision that no person may operate a common carrier vehicle without having first obtained from the regulating official or board a certificate declaring that public convenience and necessity requires such operation. In the instant case the statute specifically provides

that no certificate shall be granted for operation in territory already occupied by another certificate holder, unless such certificate holder has failed to conform to requirements imposed upon him by the regulating board.

Statutes requiring the procurement of a certificate of convenience and necessity, or some form of license, before one may begin the operation of a common carrier motor vehicle service, have been enacted in the following states:

<i>State</i>	<i>Regulating Board</i>	<i>Statute.</i>
Alabama	Public Service Commission	Code of 1923, Section 9795.
Arizona	Corporation Commission	Chapter 130, Laws of 1919, Section 3 (a).
California	Railroad Commission	Chapter 213, Statutes 1917; amended by Chapter 280, Statutes 1918, Section 5.
Colorado	Public Utilities Commission	Chapter 127, Laws of 1913, as amended April 9, 1915, and April 16, 1917, Section 35.
Connecticut	Public Utilities Commission	An Act Concerning Public Service, Motor Vehicles, etc. Laws of 1921, Section 3.
Idaho	Public Utilities Commission	Idaho C. S. Sections 2439 and 2940 required the procurement from the Public Utilities Commission, and the payment of certain fees therefor, with certain exceptions. In <i>State v. Crosson</i> , 33 Idaho 140, this statute was held unconstitutional, the court saying that the tax was not levied upon the respondents "because of their use of the public highways with their vehicles," but as an occupation tax, and that as an occupation tax it was void by reason of the exceptions.
Illinois	Commerce Commission	Illinois Commerce Commission Law, approved June 29, 1921, Section 55.
Iowa	Board of Railroad Commissioners	Chapter 97, Laws of 1923, Section 4.
Kentucky	State Highway Commission	Chapter 81, Laws of 1923, Section 4.
Maine	Public Utilities Commission	Chapter 211, Public Laws of 1923, Section 4.
Maryland	Public Service Commission	Public Service Commission Law of Maryland, as amended by Section 3 of Ch. 401 of the Acts of 1922, Section 1½.
Massachusetts	Department of Public Utilities	Chapter 159, Laws of Massachusetts, Section 45. (License to operate must be obtained from City Council or Selectmen. The Department of Public Works upon appeal may prescribe rules and regulations.)

<i>State</i>	<i>Regulating Board</i>	<i>Statute.</i>
Michigan	Public Utilities Commission	Chapter 209, Public Acts of Michigan, 1923.
Montana	Board of Railroad Commissioners	Chapter 154, Session Laws, 1923, Section 4.
Nevada	Public Service Commission	An Act to Regulate the Use and Operation of Motor Trucks, etc., approved March 21, 1923, Sections 4 and 9. (Certificates obtained through County Commissioners, with right of appeal to Public Service Commission.)
New Hampshire	Public Service Commission	Chapter 86 of the Laws of 1919, as amended by Chapter 59, Laws of 1921, Section 2.
New Jersey	Board of Public Utility Commissioners	Chapter 195 Laws of 1911, as Amended, Section 24.
New York	Public Service Commission	Chapter 219, Laws of 1909, as Amended by Chapter 667, Laws of 1915, Section 25.
North Dakota	Board of Railroad Commissioners	Chapter 136, Session Laws of 1923, Section 4.
Ohio	Public Utilities Commission	House Bill No. 474, Session Laws 1924, Section 614-87.
Oklahoma	Corporation Commission	Chapter 113, Session Laws, 1923, Section 4.
Oregon	Public Service Commission	Chapter 10, General Laws of Oregon, Special Session, 1921, Section 4.
Pennsylvania	Public Service Commission	The Public Service Company Law, approved July 26, 1913, P. L. 1374, Article I, Section 1, and Article II, Sections 2 (a) and (b).
Rhode Island	Public Utilities Commission	Chapter 2221, January Session 1922, Section 3.
South Dakota	Board of Railroad Commissioners	Chapter 124, Laws of 1923, Section 3.
Utah	Public Utilities Commission	Compiled Laws of Utah, 1917, Section 4813.
Virginia	State Corporation Commission	Chapter 161, Acts of 1923, as amended March 14, 1924, Section 3.
Washington	Department of Public Works	Chapter 111, Session Laws of 1921, Section 4.
West-Virginia	Public Service Commission	Chapter 112, Acts of 1921, as amended by Chapters 5 and 6, Acts of 1923, Section 82.
Wisconsin	Railroad Commission	Chapter 546, Laws of 1915, Section 1797-64.
Wyoming	Public Service Commission	Chapter 146, Session Laws 1915, as amended by Chapter 74 Session Laws 1917, and Chapter 38 Session Laws 1919, Section 45. (The Act does not specifically apply to common carriers motor vehicles, but has been construed so to apply by the Attorney General of Wyoming.)

The fact that such legislation has been enacted by so many states is in itself proof that unregulated competition in motor vehicle common carrier service produces conditions which are widely believed to demand

a legislative remedy. No law providing for the regulation of motor vehicles engaged in interstate commerce has been enacted by Congress. Do the statutes which have been enacted by these states, and other statutes enacted in various forms in all the states imposing regulation in varying degrees upon all motor vehicles, represent, so far as vehicles operating interstate are concerned, mere abortive attempts to meet the necessity for such regulation, or are they effective regulations properly imposed by the states under sovereign powers reserved to them under the Federal Constitution?

IN THE EXERCISE OF THEIR POLICE POWERS, RESERVED TO THEM UNDER THE FEDERAL CONSTITUTION, THE STATES MAY ENACT LEGISLATION IN AID OF THE HEALTH, SAFETY AND GENERAL WELFARE OF THEIR CITIZENS, EVEN THOUGH THE SAME MAY INCIDENTALLY AFFECT INTERSTATE COMMERCE.

The questions presented by this case in principle was long ago fully considered and determined by this court in *Cooley v. Port Wardens*, 12 Howard 299, 318. The precise question presented in that case was whether, in the absence of conflicting federal legislation, a state might regulate pilots and pilot charges. It was urged that, as to ships engaged in interstate commerce, such regulation was regulation of interstate commerce, and exclusively within the power of Congress, under the commerce clause. Denying the contention as to the effect to be given the commerce clause, the court said:

“The grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising an authority over its subject-matter. If they are excluded it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the States. If it were conceded on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the States, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the States from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the State, then it would be in conformity with the contemporary exposition of the Constitution (Federalist No. 32), and with the judicial construction given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional regulation. \* \* \*

Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects quite unlike in their nature; some imperatively demanding a single uniform rule operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation. \* \* \*



Viewed in this light, so much of this Act of 1789 as declares that pilots shall continue to be regulated 'by such laws as the States may respectively hereafter enact for that purpose,' instead of being held to be inoperative, as an attempt to confer on the States a power to legislate, of which the Constitution had deprived them, is allowed an appropriate and important signification. It manifests that understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the States, and of the national government, has been in conformity with this declaration,, from the origin of the national government to this time; and the nature of the subject when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants."

It was in conformity with the principle thus laid down that the several states for a period of more than fifty years supplied the only regulation to which interstate rail carriers were subjected, and that until now the states have supplied the obvious necessity for regulation of motor vehicles operated upon the public highways.

The power to impose this regulation has been called the police power. The extent of that power has never been defined, and is probably not capable of delimitation by definition. The California Supreme Court once pertinently declared that "The courts, even the highest court of the land, have despaired of giving a satisfactory definition to the police power of a state,—a definition which will delimit the boundaries of that power."\* At the same time it was added that:

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\**Pacific Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640.

"within the legitimate exercise of this great power comes the unquestioned right to place restrictions upon personal liberty and limitations upon the use of private property. One conspicuous example of the legitimate exercise of the police power is evidenced by the right of regulatory control exercised by courts, boards and commissions over property held in private ownership, but devoted by the owners to a public use."

"In commenting upon the police power in *Noble State Bank v. Haskell, et al.*, 219 U. S. 104, this court said:

"It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce."

No needs could be more primary to the successful carrying on of commerce over the highways of the country than that those highways shall be as free as may be possible from congestion, and that they be kept safe. In point of fact, the duty of a government to protect the safety of its citizens, and of others rightfully within its jurisdiction, is a duty paramount to all others, and hence the right of a state to keep its highways safe for public travel thereon is recognized by this court as more extensive than its right to make

regulations designed merely in aid of commerce. This was made clear in *Erie Railroad Company v. Board of Public Utility Commissioners*, 254 U. S. 394, 410.

In that case the State of New Jersey, acting through its Board of Public Utility Commissioners, had ordered the Erie Railroad to abolish certain grade crossings. The validity of the order was contested upon the ground that it imposed an undue burden upon interstate commerce. It was shown that compliance with it would cost over \$2,000,000, and that the railroad had not more than \$100,000 available. It was claimed that obligation to undertake such a large expenditure might result in the bankruptcy of the railroad, and that the order was unreasonable under the circumstances. This contention was discussed by the court, in its decision sustaining the order, as follows:

"But it is argued that the order is unreasonable in the circumstances to which we have adverted, the principle applied to the regulation of public service corporations being invoked. *Mississippi R. Commission v. Mobile & O. R. Co.* 244 U. S. 388, 391, 61 L. ed. 1216, 1219, 37 Sup. Ct. Rep. 602; *Chicago, B. & Q. R. Co. v. Railroad Commission*, 237 U. S. 220, 59 L. ed. 926, P. U. R. 1915C, 309, 35 Sup. Ct. Rep. 560. *But the extent of the states' power varies in different cases from absolute to qualified, somewhat as the privilege in respect of inflicting pecuniary damage varies. The power of the state over grade crossings derives little light from cases on the power to regulate trains.*"

"Grade crossings call for a necessary adjustment of two conflicting interests,—that of the public using the streets, and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these

railroads were laid out, *or that the advent of automobiles has given them an additional claim to consideration.* They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. *Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger.* That is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road, it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, *and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil.*" (Italics ours.)

The principles involved in the interpretation and application of the Commerce Clause of the Federal Constitution are too familiar to require any attempt to review the many cases in which the limits of residuary state power have been "pricked out by the gradual approach and contact of decisions on the opposing sides."<sup>\*</sup> It is sufficient to say that it is clear that the

<sup>\*</sup>*Nobel State Bank v. Haskell*, 219 U.S. 104.

authority of Congress over the modes and instruments of interstate commerce, in all of its forms, is plenary and paramount, so that whenever Congress acts all conflicting state legislation becomes ineffective, but that it is no less clear that, while the states may not at any time directly hamper or unreasonably burden that commerce, yet, in the absence of action by Congress, they may act in any reasonable non-arbitrary and non-discriminatory manner under their residuary sovereign powers in aid of the health, safety, and general welfare of their citizens, even though such action may affect interstate commerce.\* And this doctrine applies even to instances wherein the regulation in question is "within the reach of the Federal power." A good illustration is found in the case of *Escanaba & L. M. Transp. Co. v. Chicago*,† in which this Court discussed the power of the City of Chicago, under the

\*Among the many cases along this general line we cite the following illustrative cases:

- Cooley v. Port Wardens, 12 How. 299, 320 (pilotage);
- Sherlock v. Alling, 93 U. S. 99, 104 (marine torts);
- Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health, 118 U. S. 455, 463 (quarantine inspection fee);
- Smith v. Alabama, 124 U. S. 465 (licenses for locomotive engineers);
- Nashville C. & St. L. Ry. Co. v. Alabama, 128 U. S. 96, 100 (prohibiting color blind persons from working on railways);
- Hennington v. Georgia, 163 U. S. 299 (forbidding operation of freight trains on Sunday);
- Missouri, Kans. & Texas Ry. Co. v. Haber, 169 U. S. 613, 626 (discarded cattle);
- N. Y., N. H. & H. R. Co. v. N. Y., 165 U. S. 628, 631-2 (forbidding heating of passenger cars with stoves.)
- Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285 (stopping of trains);
- In Louisville & N. R. Co. v. Hughes, 201 Fed. 727, at pages 735 to 739, a large number of cases are collected.
- Minnesota Rate Cases, 230 U. S. 352; 57 L. ed. 1511;
- †107 U. S. 678; 27 L. ed. 442.

authority of the State of Illinois, to regulate the closing of draws in the bridges over the Chicago River.

Said the Court:

“The Chicago River and its branches must \* \* \* be deemed navigable waters of the United States, over which Congress, under its commercial power, may exercise control to the extent necessary to protect, preserve, and improve their free navigation.

“But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. \* \* \* When its (the State's) power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. \* \* \* But until Congress acts on the subject, the power of the States over bridges across its navigable streams is plenary.”

This does not mean, of course, that such reasons may be made the cloak for unjust or unreasonable discrimination or for arbitrary acts having no real relation to the public welfare, but we submit that it does mean that even where Congress may be “entitled to act, by virtue of its power to secure the complete government of interstate commerce, the State power, nevertheless, continues until Congress does act and by its valid interposition limits the exercise of the local authority.” (*Minnesota Rate Cases, supra*). This holds true in the ordinary case even after Congress may have acted by

way of delegating specific administrative authority to some federal board or commission, the field entered remaining open to valid State action unless and until the federal body in question shall itself have acted in connection with and in regulation of the subject-matter under consideration. (*Mo. Pac. R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612; 53 L. ed. 352; *Atl. C. L. R. R. Co. v. Georgia*, 234 U. S. 280.)

THE LEGISLATION OF THE STATE OF WASHINGTON, AND THE ACTION OF ITS DEPARTMENT OF PUBLIC WORKS, CONSTITUTED A REASONABLE AND PROPER EXERCISE OF THE STATE'S SOVEREIGN POWER.

*State Regulation of Motor Vehicles in General.*

As we have before said, all the States have to some extent asserted regulatory jurisdiction over motor vehicle traffic in general, designed both to promote public safety, and to procure revenue for maintenance of the highways used. This court has sustained such legislation very broadly and clearly.

In the case of *Hendrick v. Maryland*, 235 U. S. 610, 59 L. ed. 385, speaking through Mr. Justice McReynolds, it said:

“The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends upon good roads, the construction and maintenance of which are exceedingly expensive, and in recent years insistent demands have been made upon the States for better facilities; especially by the ever

increasing number of those who own such vehicles. \* \* \* In the absence of national legislation covering the subject, a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles, those moving in interstate commerce as well as others. \* \* \* This is but an exercise of the police power, uniformly recognized as belonging to the States, and essential to the preservation of health, safety and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce. \* \* \* The amount of the charges and method of collection are primarily for determination by the State itself, and so long as they are reasonable, and are fixed according to some uniform, fair, and practical standard, they constitute no burden on interstate commerce. \* \* \*

In a later decision the Court, speaking through Mr. Justice Brandeis, declared:

“The power of a State to regulate the use of motor vehicles on its highways has been recently considered by this Court and broadly sustained. It is extended to nonresidents as well as to residents. It includes the right to exact reasonable compensation for special facilities afforded, as well as reasonable provisions to insure safety, and it is properly exercised in imposing a license fee, graduated according to the horsepower of the engine.” (*Kane v. New Jersey*, 242 U. S. 160, 61 L. ed. 222.)

These decisions would appear conclusively to determine that the general regulation of motor vehicle operation over their highways is a proper exercise of fundamental State powers, so long as it does not discriminate against or hinder the flow of interstate commerce.



*State Regulation of Common Carriers by Automobile.*

In our preliminary discussion in this brief we have pointed out the necessity which exists for regulation of motor vehicle common carrier traffic in particular, and have shown that it is a necessity which has been recognized in most States (See page 11 of this brief) by statutes imposing requirements additional to those which apply to ordinary motor vehicle operation. That such classification and additional regulation of such operations is proper has been determined in numerous cases\* and it is clear that it does not constitute class legislation.

As mentioned above, an important factor in the regulation of motor stages is the usual requirement that any prospective operator of such a stage shall, as a condition precedent to commencing operations, procure a certificate declaring that public convenience and necessity require the service proposed to be undertaken. The situation is thus similar to that concerning the construction of proposed new lines of railroad or of the extension of old ones under the new "certificate provisions" of the Interstate Commerce Act. In consider-

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\**Nolen v. Reichman* (D. C.) 225 Fed. 812; *Lutz v. New Orleans* (D. C.) 235 Fed. 978 affirmed in *Lutze v. New Orleans* (C. C. A. 5) 237 Fed. 1018, 150 C. C. A. 654; *Schoenfeld v. Seattle* (D. C.) 265 Fed. 726; *Hadfield v. Lundin*, 98 Wash. 657, 168 Pac. 516, L. R. A. 1918B, 909, Ann. Cas. 1918C, 942; *West v. Ashbury Park*, 89 N. J. Law, 402, 99 Atl. 190; *Jitney Bus Association v. Wilkes-Barre*, 256 Pa. 462, 100 Atl. 954; *West Suburban Transportation Co. v. Chicago & West Towns Railway Co.* (Ill.) 140 N. E. 56; *Western Association v. Railroad Commission*, 173 Cal. 802, 162 Pac. 391; *New Orleans v. LeBlanc*, 139 La. 113, 71 South. 248; *Huston v. Des Moines*, 176 Iowa, 455, 156 N. W. 883; *Cummins v. Jones*, 79 Or. 276, 155 Pac. 171; *Desser v. Wichita*, 96 Kan. 820; 153 Pac. 1194, L. R. A. 1916D, 246; *ex parte Sullivan*, 77 Tex. Cr. R. 72, 178 S. W. 537; *Memphis v. Tennessee*, 133 Tenn. 83, 179 S. W. 631, L. R. A. 1916B, 1151, Ann. Cas. 1917C, 1056; *ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840; *Motor Transit Co. v. Railroad Commission*, 189 Cal. 573.

ing an application for such a certificate the commission or other administrative body in question does not and should not look to the desires of the particular individual or corporation before it, but rather to the general public welfare. If that welfare would be conserved and aided by the rendering of the proposed service and the applicant appears fitted to render it satisfactorily, the certificate may be granted; if otherwise, it may properly be denied.

Among the considerations to be given weight in this connection are: (1) the nature of the service which the applicant desires to render; (2) the nature and adequacy of service already being rendered by others; (3) the existing population and industries which give rise to a demand or need for such service and the probable future development thereof; (4) the likelihood that applicant can earn a fair return upon the investment which will be necessary; (5) the desirability of allowing such investment to be made by a public service enterprise under all the circumstances; and (6) the general character, reliability, responsibility and financial ability of the particular applicant himself. In connection with automobile stage applications, the administrative body must also carefully consider the possible seasonal nature of the business which may be expected, since one of the prime requisites of the public where automobile stages are concerned is reasonable continuity and reliability of service, even at off-peak periods. This renders particularly necessary the consideration of the nature of the service already being rendered by existing operators. As was said in a recent case by the California Supreme Court:

“It is in the interest of the public that the service rendered by public utilities be adequate and

of good quality and the rates as low as possible commensurate with good service and a reasonable return to the owner. The certificate of public convenience and necessity is the means whereby protection is given to the utility rendering adequate service at a reasonable rate against ruinous competition. The person or corporation obtaining a certificate must operate at the times and in the manner prescribed by such certificate, thus furnishing uniform and efficient service to the public. If anyone else would be at liberty to operate without such a certificate he might operate at his own pleasure and only under favorable conditions, thus making it impossible for the holder of the certificate to successfully carry on his business. It is the public interest in efficient service which is being safeguarded by the requirement of a certificate. (*Oro Electric Corp. v. Railroad Commission*, 169 Cal. 466, 475; *Public Utilities v. Garviloch*, 181 Pac. 272, P. U. R. 1919-E, p. 182.) Such requirement is part of the regulation of transportation companies in the interest of the public." (*Motor Transit Company v. Railroad Commission*, 189 Cal. 573.)

That this power to grant or withhold authority to engage in a semi-public calling is legitimate and proper within the limits of the residuary powers of the States can, we submit, admit of no argument. It has been universally upheld by the courts. It may not, of course, be arbitrarily exercised, but the presumption is that an administrative body has exercised its powers in a lawful manner (*Cooke v. Halsey*, 16 Peters 171, 10 L. ed. 891) and if it acts reasonably and non-arbitrarily for the conservation of the general welfare, its actions will be held valid, since—

“The granting or withholding of the certificate is an exercise of the power of the state to determine whether the rights and interests of the general public will be advanced by the prosecution of the enterprise which it is proposed to carry on for the service of the public.” (*Oro Electric Corp. v. Railroad Commission*, 169 Cal. 466; citing *People v. Wilcox*, 207 N. Y. 86.)

Not only is the general welfare involved in the case of automobile stages, but public safety and health are directly concerned, and the State is peculiarly interested in such operations, since they are carried on over its highways, built at public expense and for the general use of all the people, for—

“Authority to use the public highways as a common carrier of passengers for hire is not a right belonging to the individual, but it is in the nature of a privilege. \* \* \* Due consideration for the safety of the public requires that a careful selection should be made of the individuals to whom authority is given to use the public highways as carriers of passengers for hire.” (*Gizzarelli v. Presbrey*, Supreme Court of Rhode Island, 117 Atl. 359.)

If the authorities to which we have referred establish, as we believe they do, that the regulation of motor vehicles operated as common carriers is a proper subject for action by the several States in the exercise of sovereign powers reserved to them, such regulation necessarily includes the power to deny applications for authority to operate when such operation will be inconsistent with the public interest. If this be so, then the mere fact that any particular operator proposes to

run his stage across a state line can not, in and of itself, render the State powerless to deny his request for such a certificate, irrespective of the circumstances. Otherwise a State, having provided a system of highways adequate to the private uses of its citizens, and of the citizens of other States, and adequate also to meet the demands of all necessary common carrier uses, both state and interstate, would be, by reason of the Federal Constitution, impotent to prevent such highways from being overcrowded, and rendered insufficient and unsafe through the operation thereon of an unnecessary number of motor vehicles competing with each other in common carrier service.

Either motor vehicles so operating across state lines are free from State regulation, as to engaging in business, and may so engage in such numbers as they will, or they may be compelled to procure authority to operate in the same manner as such vehicles operating intrastate. And if the State may require them to apply for authority, and to make a showing in support of their application, it necessarily follows that, after a hearing, the application of one desiring to do an interstate business may be denied upon any reasonable ground that would be a basis for denial of authority to operate a purely intrastate business.

In this case the appellant has secured from the regulating commission of Oregon a certificate of convenience and necessity to operate over that portion of the route of his proposed line which lies within the State of Oregon. And it has been urged that the State of Washington can not be the judge of the necessity of the people of Oregon for opportunity to travel in interstate commerce between Oregon and points in Washington. This may be conceded, but it may also be said

that the State of Oregon can not create rights for its citizens within the State of Washington, nor in any way control the action of the State of Washington in the exercise of its sovereign powers.

If existing agencies of interstate transportation are not sufficient, and if the action of the State of Washington does in fact operate to obstruct the flow of interstate commerce, it is for the Nation and not the State of Oregon to determine that fact and to remedy it. So long as the Congress refrains from action the State may exercise its power of regulation, even as to persons operating interstate, so long as it does not act in an arbitrary manner.

It may be added, furthermore, that it appears from the record that there are existing agencies of transportation both by rail and by motor vehicles whereby persons desiring to travel to and from points in Oregon from and to points in Washington may do so.

There is no obstruction to the flow of interstate commerce, but the same is already flowing through existing adequate channels.

*The Regulation of Motor Vehicle Common Carriers  
Imposed by the State of Washington is in Aid of  
Interstate Commerce.*

It should be further pointed out that the regulation imposed by the State of Washington, and complained of in this case, is in aid of interstate commerce, and in harmony with the policy and purpose of Congress, as expressed in the Transportation Act of 1920.

In that Act Congress recognized financial strength on the part of interstate carriers as necessary to efficient performance by such carriers of their interstate

functions. Among other provisions contained in the Act for insuring such financial strength is that which forbids the construction of new lines of railroad, except as public necessity and convenience are found to require the same. Hurtful diminution of the business of existing railroads through unnecessary and unwise competition by new railroad lines is thus guarded against.

The Transportation Act, however, left unrestricted and untouched other common carrier agencies which might compete with the rail carriers, such as motor vehicle common carriers. But diminution of rail carrier revenues by the operation of numerous unregulated common carrier motor vehicles, so far as it might occur, would be certainly just as hurtful to rail carriers as a like diminution caused by new competing lines of railroad. Accordingly, when a State, for the protection of interstate carriers, as agencies of intrastate commerce, restrains unreasonable and unjustified competition by motor vehicles, within the State's jurisdiction, such action, so far as it incidentally affects interstate commerce, operates not to burden and obstruct it, but as an aid to such commerce, and in furtherance of the plan and purpose of Congress as expressed in the Transportation Act.

One purpose of the Washington statute clearly is to protect from unjustified and hurtful competition motor vehicle common carriers already operating within the State of Washington, under authority from the State.

As has already been pointed out, this is exactly the same kind of protection which Congress has given to existing rail lines, by restraining the opening of competing new rail lines. The States generally have restricted competition in other branches of public utility

enterprise, and the propriety and lawfulness of such restriction is not questioned. No reason can be suggested why motor vehicles, engaged in an enterprise impressed with a public use, should be exempt from the application of established principles of law, which apply generally to such enterprises. And when a State enacts legislation designed to aid and protect motor vehicles engaged in public service within its borders from unreasonable competition, making no discrimination between those operating interstate and intrastate, so far as such legislation affects interstate commerce carried by motor vehicle common carriers, it is an aid and not an obstruction to such commerce.

*Court and Commission Decisions Involving the Question Presented in This Case.*

While, of course, not in any respect conclusive upon this Court, we believe it to be of interest and quite persuasive, that the question now under discussion has been many times raised before other tribunals, and always has been determined along the lines contended for herein. Invariably, such common carrier motor vehicle operations have been declared amenable to reasonable and non-arbitrary regulation and control by the local authorities, even though they were claimed to be, and admittedly were "interstate" in character.

The first case of importance in which this question appears to have been discussed is that of *Interstate Motor Transit Co. v. Kuykendall*, 284 Fed. 882, decided in November, 1922, by the Federal District Court for the Western District of Washington (No. Div.), after argument before Gilbert, Circuit Judge, and Cushman and Neterer, District Judges. The opinion in this case (by Neterer, J.) states that the plaintiff,



a Washington corporation, alleged that it was operating an automobile passenger stage service between Seattle, Washington, and San Francisco, California, via Portland, Oregon, and doing no intrastate business in the State of Washington. The court was asked to enjoin the enforcement of the automobile state regulation act of Washington (Laws 1920-21, p. 338), as against the plaintiff, on the ground that such enforcement would contravene the interstate commerce clause of the Federal Constitution. The Court refused the request, and declared that the State "has full power to regulate or prohibit the use of public highways as a place of business by common carriers for hire;" that the State had expended very large sums of money in constructing these highways; that the purpose of this statute was not to regulate interstate commerce, but to regulate the use of these highways, and that a mere incidental affecting of interstate commerce would not invalidate the act, particularly where it is made to apply to all alike without discrimination.

The next case of interest in this connection is that of *Northern Pacific Railway Co. v. Schoenfeldt*, 213 Pac. 26 decided by the Supreme Court of the State of Washington in February, 1923. In this case the same parties who had been plaintiffs in the Federal case above-mentioned were parties defendant, and here the State Court was asked by certain railroads, whose routes were being paralleled, to enjoin the defendants' operation on the ground that defendants had not complied with the auto stage regulation act of Washington, and that there existed no public necessity for the operation in question. The Court (speaking through Tolman, J.) said:

"The first and most important question to be decided is whether or not the business conducted by respondent is one which is within the power of the state to regulate, prohibit or burden, and, if so, whether the act in question is such a regulation as is prohibited by the federal constitution."

Section 8 of the Washington act declares that the act does not apply to interstate commerce, "except in so far as the same may be permitted under the provisions of the Constitution of the United States and the Acts of Congress." Said the Court:

"But it is contended that section 8 of the act specifically excludes such operations as are here shown. So far as it is necessary to construe that section, we think it clearly prospective, enacted with a view to a possible future time when Congress may assert its right to regulate and control such transportation; that it was inserted for the purpose of strengthening the act, and not to limit it, except as the courts might hold that Congress had by proper legislation assumed jurisdiction."

The Court also declared that:

"It may be conceded that the transportation of passengers from a point within the state to a point without the state, and vice versa, is interstate in its nature; but it by no means follows therefrom that such a business is for that reason free from all state regulation. \* \* \* (Quoting from 12 Corpus Juris, p. 12 re. the relation of the States to the Commerce Clause of the Federal Constitution.)  
• • •

"The purpose of the act under consideration is clearly apparent from its title and contents, and that purpose is *to regulate the use of the highways of the state by those engaged in carrying on busi-*

*ness thereon for their own private gain, whether engaged in interstate or intrastate commerce, and it applies alike to each class without discrimination."* (Italics ours.)

This language is, we submit, directly applicable to the situation here presented. As we have seen above, there can be no question as to the right of a State under its residuary and sovereign powers to regulate the use of its highways for private gain, and even where the regulation of such use incidentally affects non-residents or persons engaged in the interstate use of highways it is clear that the State may exercise this sovereign power in any reasonable manner. The primary purpose is not to regulate interstate operations, but the use of the State's highways as common carriers for hire. As stated by the Federal Court in the case of *Interstate Motor Co. v. Kuykendall*, above mentioned, it is only "when a party so engaged (*i. e.*, carrying passengers for hire) seeks to appropriate the highway of a State" that the permission of the State is required.

This is the sense in which the Supreme Court of the State of Washington declared in a recent opinion that,

"The streets and highways belong to the public. They are built and maintained at public expense for the use of the general public in the ordinary and customary manner. The state, and the city as an arm of the state, has absolute control of the streets in the interest of the public. No private individual or corporation has a right to the use of the streets in the prosecution of the business of a common carrier for private gain without the consent of the state, nor except upon the terms and conditions prescribed by the state or municipality, as the case may be. The use of the streets as a

place of business or as a mere instrumentality of business is accorded as a mere privilege and not as a matter of natural right. (*Hadfield v. Lundin*, 98 Wash. 657; 168 Pac. 516; L. R. A. 1918E, 909; Ann. Cas. 1916C, 942.)

A case of particular pertinency in this connection is *Liberty Highway Co. v. Michigan Public Utilities Commission*, 294 Fed. 702 (Dec. 11, 1923), in which the Federal District Court for the Eastern District of Michigan, in a *per curiam* opinion (Donohue, Circuit Judge, and Tuttle and Simons, District Judges, sitting) denied an injunction to halt the enforcement of the common carrier automobile stage and truck regulation act of Michigan against an admittedly interstate operator. Said the Court:

"It is not within the power of the state, even under the guise of an exercise of its police power, to require a license for the privilege of engaging in or otherwise interfering with interstate commerce as such, for that would be to regulate such commerce, the power to do which has been surrendered by the state to Congress. *Wabash, St. Louis & Pacific Railway Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. ed. 244; *Robbins v. Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. ed. 694; *Bowman v. Chicago & Northwestern Railway Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; *Harmon v. Chicago*, 147 U. S. 396, 13 Sup. Ct. 306, 37 L. ed. 216; *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. ed. 719; *Barrett v. New York*, 232 U. S. 14, 34 Sup. Ct. 203, 58 L. ed. 483; 2 *Sault Ste. Marie v. International Transit Co.*, 234 U. S. 833, 34 Sup. Ct. 826, 58 L. ed. 1337, 52 L. R. A. (N. S.) 574; *Askren v. Continental Oil Co.*, 252 U. S. 444, 40 Sup. Ct. 355, 64 L. ed. 654; *Lemke v.*

Farmers Grain Co., 258 U. S. 50, 42 Sup. Ct. 244, 66 L. ed. 458.

"The Commerce clause of the Federal Constitution does not, however, deprive the states of the right to reasonably regulate under their police power the use of their public highways, and to that end to require a license and impose a reasonable charge therefor, for the privilege of such use, even if thereby interstate commerce is incidentally affected, provided that such regulation, license, and charge bear a reasonable relation to the safe and proper maintenance and protection of such highways, do not obstruct or burden interstate commerce, and are not in conflict with federal legislation on the same subject enacted within constitutional limitations. *Escanaba & Lake Michigan Transportation Co. v. Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. ed. 442; *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. ed. 380; *Minnesota Rate Cases (Simpson v. Shepard)* 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; *Hendrick v. Maryland*, 235 U. S. 610, 35 Sup. Ct. 140, 59 L. ed. 385; *Kane v. New Jersey*, 242 U. S. 160, 37 Sup. Ct. 30, 61 L. ed. 222; *Mackay Telegraph & Cable Co. v. Little Rock*, 250 U. S. 94, 39 Sup. Ct. 428, 63 L. ed. 863; *Interstate Motor Transit Co. v. Kuykendall (D. C.)* 284 Fed. 882; *Camas Stage Co. v. Kozer*, 104 Or. 600, 209 Pac. 95, 25 A. L. R. 27; *Northern Pacific Railway Co. v. Schoenfeldt (Wash.)* 213 Pac. 26.

"The case of *Interstate Motor Transit Co. v. Kuykendall*, *supra*, involved a statute similar in nearly all essential respects to Act 209. The plaintiff was engaged in interstate commerce between Seattle and San Francisco, and did no intrastate commerce business. This case was heard by a special court convened under section 266 of the Judicial Code (Comp. St. Sec. 1243), and the statute

was held valid as against the same constitutional objections as are here urged. The Kuykendall Case follows, and is largely ruled by the decisions of the Supreme Court in *Hendrick v. Maryland*, *supra*, and *Kane v. New Jersey*, *supra*. In the *Hendrick* case Mr. Justice McReynolds said:

'The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends on good roads, the construction and maintenance of which are exceedingly expensive. \* \* \* In the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as other. \* \* \* This is but an exercise of the police power, uniformly recognized as belonging to the states, and essential to the health, safety and comfort of their citizens, and it does not constitute a direct and material burden on interstate commerce. \* \* \* The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform fair, and practical standard, they constitute no burden on interstate commerce.'

"Plaintiffs have not successfully distinguished the *Kane* and *Hendrick* cases from the instant case, in so far as they relate to interstate commerce. The vehicles sought to be regulated by the Michigan statute are commercial vehicles carrying both passengers and freight. It may be well considered that their operations involve a greater menace to public safety and are more destructive of the highways than are private automobiles operated for pleasure, and that they call for a greater degree of

regulation and a higher compensation for the use of special facilities afforded.”\*

Another case of direct application here is that of *Bush & Sons Co. v. Maloy*, 123 Atl. 61, decided by the Maryland Court of Appeals on June 26, 1923. An application for a permit to do both an intra and an interstate business, or in any event, to do the interstate portion thereof, having been filed, and the applicant having agreed to pay all licenses and comply with all statutes, rules and regulations of the state, the permit was refused by the State Public Service Commission on the ground that “the public welfare and convenience” did not require granting of such permit. An injunction was thereupon requested, to prevent the Commission from enforcing the statute against the applicant. At the risk of burdening the Court we are constrained to quote somewhat *in extenso* from the well considered opinion of Judge Pattison in this case, for its logic appears to us to be irrefutable. The petitioner’s chief reliance was in the principles announced in *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. ed. 649, and *Barrett, President of Adams Express Co. v. New York*, 232 U. S. 14, 34 Sup. Ct. 203, 58 L. ed. 483. Said the Court:

“In these cases there was an attempt to prohibit persons from engaging in the classes of business therein mentioned until they had first paid the direct license or tax imposed upon them. The requirement of the act here under consideration is that those wishing to use the roads and highways

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\*A certain provision of the Michigan statute was held to be without the scope of the title, and another (providing for indemnity bonds) was held to burden interstate commerce, but as both such provisions were deemed severable from the balance of the statute, it was, as a whole, declared to be a valid exercise of the state’s “police powers.”

mentioned in their application for the public transportation of merchandise or freight shall first obtain a permit from the Public Service Commission of the state. Neither the statute nor the order appealed from imposes any burden or restriction, directly or indirectly, upon the plaintiff's right to engage in interstate commerce.

"As stated in the brief of the appellee:

'The state, at the cost of many million dollars to the taxpayers, has established a fine system of improved public highways, and is expending millions more in the extension, improvement, and maintenance of this system.'

"The public highways over which the appellant seeks to operate its motor trucks, as instrumentalities of interstate commerce, were either built by or owned by the state, or the counties traversed by them.

"It was the duty of the Commission under the statute, upon the receipt of the appellant's application for permits to operate the motor truck lines named in the application, 'to investigate the expediency of granting said permits, the number of motor vehicles to be used and the rate to be charged; but, as stated by the statute, if the Commission deemed the granting of such permits prejudicial to the welfare and convenience of the public, they were not only empowered and authorized to refuse the granting of the permits, but it was their duty to do so.

"A statutory regulation of this character is essential not only to the protection of the above-mentioned highways built at great expense to the state and counties, but also to the safety of the public who travel upon them. The roads and highways are subject to great damage and injury when used by very large motor vehicles equipped without regard to the effect their use will have upon the roads, and, of course, the injury or damage is



greater when large numbers of them are operated thereon; consequently the number of them used for profit and gain in the transportation of freight or passengers should be restricted to the public need or convenience, and, when the number is in excess thereof, their use becomes prejudicial to the welfare and convenience of the public. The operation of motor trucks upon these highways in most, if not in all, cases is a great convenience to the public, especially to those persons living along the route on which they are operated. It is therefore important that the use of the highways shall be so regulated as to assure the enjoyment of this right to the public, which right may be seriously affected by the failure of those to whom the privilege is granted to give proper service, caused by their inability to operate with a profit, resulting from the excessive number to whom such privilege is granted. The object and purpose of the act is to restrict to the needs of the public the number of motor vehicles used in the transportation of freight or merchandise upon any one route, and thereby avoid the additional injury and damage to the roads or highways, and the danger to persons traveling thereon, that would result from the use of a greater number than the needs and convenience of the public require. It must be that the safety of the traveling public is lessened by the increased number of motor trucks operating upon the roads.

"It is admitted that Congress has enacted no legislation undertaking to regulate the instrumentalities here involved for carrying on interstate commerce, and thus it would seem that this case falls within the class of cases which are controlled by the principles enunciated in the *Minnesota Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A,

18. (Here follows a lengthy quotation from that leading case.)

“If the contention of the appellant be correct, that the attempted regulation of the use of the highways of this State by the Public Service Commission under the statute mentioned is unconstitutional and void when applied to the appellant and others who apply for permits to engage in the transportation of freight and merchandise from points in this state to points in some other state, then there are no regulations of the use of the highways, nor can there be any until Congress sees fit to pass them, and this it may never do. If it does not, these valuable highways of the state will be subject to the use of motor vehicles of all sizes and character by the persons mentioned. This should not be, and in our opinion is not, the law. But, as we have said, this case is controlled by the principles laid down in the Minnesota Rate Cases, and until Congress passes some legislation regulating the use of said highways, by the instrumentalities here mentioned, the right to do so, within the limitations here mentioned in those cases, is lodged with the legislature in this state.”

Another most interesting case is *Choate et al. v. Illinois Commerce Commission*, 309 Ill. 248, where the court set aside an order of the Illinois Commerce Commission granting a certificate of convenience and necessity for the operation of a bus line.

The Illinois law requires the procuration from the commission of a certificate that public convenience and necessity require the transaction of a proposed motor vehicle common carrier business before the same may be begun. The commission had granted such a certificate to a bus line to operate over the paved highways

between Aurora and Elgin, against the opposition of Choate, receiver of the Aurora, Elgin & Chicago Railroad Company, which furnished an electric interurban service between those points. Upon appeal the Circuit Court of Illinois sustained the order of the Commission. Upon appeal from the Circuit Court the Supreme Court reversed the lower court, and set aside the commission's order. We quote the opinion in part:

"This territory is now served by the Aurora, Elgin & Chicago Railroad Company, which furnishes an electric interurban service. \* \* \* There is no evidence that a complaint was ever filed with the Commerce Commission, or that the commission was ever requested to order the receiver to provide more adequate service. \* \* \*

The railroads in this country have kept pace with the industrial development and the population increase, and the prosperity of the nation has been due to a large extent to the steady expansion of the transportation system. The savings of hundreds of thousands of investors have been massed to build our great network of railroads, and these transportation systems are entitled to protection from irresponsible competition. If shoe-string transportation companies, with no money invested in right of way and no reserve capital to provide adequate service, or to protect the public from damage, are permitted to drop in here and there and take the cream of the transportation business from the permanent transportation systems, disastrous results are inevitable. If the permanent highways built at the expense of the people are destroyed, these irresponsible bus lines, that profess to serve the public convenience and to supply public necessity, will leave the public to walk or to provide other transportation facilities.

Orders of the public authorities to furnish adequate transportation facilities would be unavailing because the bus lines would be wholly incapable of complying with the order.

The statute provides the means for compelling the existing transportation systems to provide adequate service for the public. If the people living in the territory through which the Aurora, Elgin & Chicago Railroad operates are not being properly served, they can file a complaint with the Commerce Commission, which has the power to order whatever change or increase in service the evidence warrants. If the existing transportation company does not comply with the commission's order, then a situation may arise where the public convenience and necessity will require the establishment of another system. The theory of the Public Utilities Act is to provide the public with efficient service at a reasonable rate by compelling an established carrier occupying a given field to provide adequate service and at the same time to protect the existing utility from ruinous competition. *West Suburban Transportation Co. v. Chicago & West Towns Railway Co.* (No. 15273) 140 N. E. 56. By this method the public is protected from paying the cost of the operation of competing systems and a return upon a double investment of capital. No doubt the proposed bus line would accommodate a few individuals in the Fox River valley, but the convenience and necessity which the law requires to support the commission's order is the convenience and necessity of the public as distinguished from that of an individual or any number of individuals."

The questions here under consideration have also come before a number of regulatory commissions in various parts of the country, and, while the decisions of such bodies may not have the force of judicial pre-

cedents, we cite them as entitled to weight, coming as they do from men who are dealing daily with these very problems. (*Bluefield v. Public Service Commission*, West Virginia Court of Appeals, 118 S. E. 542.) They show complete and unanimous agreement to the effect that this regulation is necessary, lawful and proper and that it does not place an undue or unconstitutional burden upon interstate commerce.

*Chambersburg G. & W. St. R. Co., v. Hardman*,  
(Pennsylvania Public Service Commission)  
P. U. R. 1921C, 628.

*Re Walter H. Engeleke*, (N. Y. Public Service  
Commission) P. U. R. 1922C, 71.

*Bartels v. Hessler Brothers*, (Illinois Commerce  
Commission) P. U. R. 1922D, 193.

*Geneseo-Rock Island Bus Co. v. Hilbert*, (Illinois  
Commerce Commission) P. U. R. 1923F,  
311.

*Re Jacobson* (Washington Department of Pub-  
lic Works) P. U. R. 1923E, 481.

*Re Frank Barnes* (Washington Department of  
Public Works) P. U. R. 1923E, 719.

*Re Buck and Re Interstate Motor Transit Com-  
mission* (Washington Department of Public  
Works) P. U. R. 1923E, 737.

*Re Interstate Motor Transit Company* (Rail-  
road Commission of California, October 23,  
1923, Decision No. 12739.)

*In the Matter of the Application for Certificate  
of Public Convenience and Necessity of the  
Reo Bus Line of Alexandria, Virginia* (State  
Corporation Commission of Virginia, Decem-  
ber 15, 1923, Case No. 1854, P. U. R.)

THE FEDERAL STATUTES PROVIDING FOR  
FEDERAL AID TO THE STATES IN THE  
CONSTRUCTION OF POST ROADS IN NO  
WAY CONFLICT WITH SUCH EXERCISE  
OF THE STATE'S POWER OF REGULATION  
OF ITS HIGHWAYS AS IS COMPLAINED OF  
IN THIS CASE.

The appellant contends that he has a vested right to use the Pacific Highway, by reason of the contribution towards the construction or reconstruction of the same made by the Federal Government under the Federal Aid Act, and approved July 11, 1916, and the Federal Highway Act approved November 9, 1921. The Federal Aid Act provides "that all roads constructed under the provisions of this act shall be free from tolls of all kinds," and the Federal Highway Act that "All highways constructed or reconstructed under the provisions of this act shall be free from tolls of all kinds." It is claimed that the requirement for the payment of license fees, contained in the Washington statute, is in conflict with these provisions relating to "tolls."

It may be admitted that fees required to be paid for licenses to operate motor vehicles over the highways are in the nature of tolls rather than taxes. They are an exaction by the owner of property for the use of it. If, therefore, the language upon which the appellant relies were to be narrowly construed, without regard to other provisions of the statutes in which it is found, or to the purpose of those statutes, or to the circumstances surrounding their enactment, it might be said that the fee provision of the statute of the State of Washington fall within the inhibition of the "toll"

provisions of the Federal statutes. But that would be to follow the letter of the law, and to disregard the spirit of it.

The question is, did Congress, by the quoted words which forbid all tolls, intend to prevent the states from regulating motor vehicles, by the imposition of license fees or registration fees designed to produce revenues for highway maintenance?

It is a primary rule that in construing a statute regard shall be had to the purpose of it. The purpose of the Federal Aid Act, and of the Federal Highway Act, which amends it, is declared in the title of the original act. It was to "aid the states in the construction of rural post roads." The action of the Federal Government in undertaking thus to aid the states was a response to the demand for improved highways which had been produced by the development of motor vehicles. The cost of building improved highways to meet the needs of motor vehicle traffic was so great that they were not constructed by the states fast enough to meet the wishes and the needs of the public; and the construction of those that were built was entailing very heavy public debts upon the states. There was a general feeling that the Federal Government should help meet the emergency caused by the necessity for such extensive improvements in public facilities, which would be used so largely for interstate traffic.

While Congress acceded to the demand for Federal aid, it did so very guardedly. The plan adopted was to aid state construction in the first instance, but to require the states at their own expense to meet the entire cost of maintaining the highways after they were built. Section 7 of the Act of 1916 provided as follows:

"To maintain the roads constructed under the provisions of this Act shall be the duty of the States, or their civil subdivisions, according to the laws of the several States. If at any time the Secretary of Agriculture shall find that any road in any State constructed under the provisions of this Act is not being properly maintained he shall give notice of such fact to the highway department of such State and if within four months from the receipt of said notice said road has not been put in a proper condition of maintenance then the Secretary of Agriculture shall thereafter refuse to approve any project for road construction in said State, or the civil subdivision thereof, as the fact may be, whose duty it is to maintain said road, until it has been put in a condition of proper maintenance."

Section 7 of the Act of 1921 provided as follows :

"Before any project shall be approved by the Secretary of Agriculture for any State such State shall make provisions for State funds required each year of such States by this Act for construction, reconstruction, and maintenance of all Federal-aid highways within the State, which funds shall be under the direct control of the State highway department."

When the Federal Aid Act was passed in 1916 the States had already passed laws requiring registration of motor vehicles, and were raising very great sums of money in the form of license fees, or registration fees, for the purpose of highway maintenance and construction. These fees were in the nature of an exaction for the use by the motor vehicles registered or licensed of the highways generally throughout the jurisdiction of the licensing states. Inasmuch as the inter-relating systems of highway which the Federal Government de-



signed to help construct would embrace the principal traffic routes in the several states, it is evident that the exemption of highways receiving Federal aid from the requirements of the state licensing or registration statutes would break down the system whereby the states were obtaining in large part the money expended by them for highway maintenance. At the very time, therefore, that the Congress was endeavoring to induce the States to build more improved highways, and to provide for their maintenance, it used language which, if the appellant's construction of the toll provision is correct, destroyed the sources of revenue upon which the States depended to raise money for highway purposes.\*

\*It is interesting to note the completeness with which the "toll" provisions, construed as the appellant contends they should be construed, would cut off some of the states from in any manner deriving revenues from motor vehicle operation for highway maintenance. In addition to registration or license fees, many states have established assessments upon the sale of gasoline, commonly called gasoline taxes. Congress has done this in the District of Columbia. In a state where the constitution requires proportional and equal taxation on all classes of property taxed, however, as in New Hampshire, such assessments may be sustained only if laid not as taxes upon the gasoline sold, but as "a charge or toll for the use of the highways of the State." In its opinion so holding the New Hampshire Supreme Court said:

"It is a matter of common knowledge that since the advent of the use of automotive vehicles upon highways large sums have been expended in making the conditions more favorable for that class of traffic. No reason appears why the Legislature may not impose upon those who accept the benefits of such highway improvement and maintenance a reasonable charge for the use made. It is upon this ground that the state registration systems for automobiles have been sustained. The purpose of these laws is 'to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential, and whose operations over them are peculiarly injurious.' *Hendrick v. Maryland*, *supra*, 235 U. S. 622, 35 Sup. Ct. 142, 49 L. ed. 385. \* \* \* The charge cannot be imposed upon sales of gasoline, generally, but only when the commodity is sold for consumption in the operation of vehicles upon the highways. A charge so limited amounts to the same thing, in substance, as a toll for the use of the highways, and may lawfully be imposed by the Legislature." *In re Opinions of the Justices*, Supreme Court of New Hampshire, 120 Atlantic 629.

Such destruction of those sources of revenue would have operated so directly to thwart the purpose which Congress had in mind that an intent to accomplish it will not be attributed to any ambiguous language. The word "tolls" is ambiguous, in that it is susceptible of use to express a variety of meanings. But it has ordinarily been used to denote a charge exacted for passing over a *particular* turnpike or bridge or ferry. On the other hand, while the registration fee enforced by the States, whereby a right was obtained with a certain designated vehicle to pass over all highways within the registering State for a certain designated period might be said to be analogous in principle to the exaction of tolls, it is believed that in none of the statutes requiring such registration were the fees referred to as "tolls." In the nomenclature of the time they were not "tolls" but were "license fees" or "registration fees."

The Federal Aid Act forbade the imposition of "tolls" upon highways improved with federal aid. The statute, however, was not anywhere interpreted as forbidding the exaction of the registration or license fees theretofore customarily required by state statutes for the operation of motor vehicles. The States continued, after it was passed, to raise money for highway purposes through the medium of such fees, as they had done before. This supplied a contemporaneous construction of the Act, which was acquiesced in by the Secretary of Agriculture and by the Congress itself. When the Federal Highway Act was passed in 1921 the same language was used as had been used in 1916. It is impossible to believe that Congress would have continued to appropriate money for State aid without any attempt to compel observance of its requirement,

if the intent of Congress had been, by the toll provision, to prevent the collection of license fees or registration fees by the states as a prerequisite to the operation of motor vehicles over their highways generally, including those constructed with Federal aid.

If Congress, when it passed the Federal Aid Act, had designed to exempt motor vehicles using highways improved with federal aid from all registration and license fees, it would have used the then familiar terms to describe those fees. If for any reason it had failed to do that in the Federal Aid Act, when it thereafter appeared that the states generally were continuing to exact fees, with the apparent understanding both on the part of federal and state officials that such exaction was not inconsistent with the provisions of the federal act, when Congress came to amend the act in 1921 by the passage of the Federal Highway Act, it would certainly then have made its intent clear. The use of substantially the same words in the Federal Highway Act which were used in the Federal Aid Act was, therefore, in effect, a legislative approval of the construction which had been placed upon the toll provisions of the first act.

That there was a distinction in their proper use between the words "fee" and "toll" is shown by the language of this court in *Kane v. New Jersey*, 242 U. S. 160, where the license fee, exacted by the State as a prerequisite to motor vehicle operation upon the highways of the state, was contrasted with a "toll." In upholding the right of the state to exact the fee, the court said:

"The amount of the fee is not so large as to be unreasonable; and it is clearly within the discretion of the state to determine whether the compensation for the use of its highways by automobiles shall be determined by way of a fee, payable annually or semiannually, or by a toll based on mileage or otherwise."

This decision was handed down by the court on December 4, 1916, approximately five months after the passage of the Federal Aid Act. It indicated that this court considered that license fees exacted for the right to operate motor vehicles upon the highways of a state were not "tolls."

The question raised in this case, as to the validity of license fee requirements, was raised in *Liberty Highway Company et al. v. Michigan Public Utilities Commission*, 294 Fed. 703. In that case the court sustained the state statute requiring the payment of license fees, as did the court below in this case. We quote from the opinion on that point:

"Section 9 of the Federal Highway Act of November 9, 1921, (42 Stat. 212 (Comp. St. Ann. Supp. 1923, sec. 7477 $\frac{1}{4}$ h)), provides:

'All highways constructed or reconstructed under the provisions of this act shall be free from tolls of all kinds.'

"This is not in our judgment intended to refer to license fees such as are here involved (it not being even claimed that such act has reference to the analogous fees imposed under general motor vehicle license laws, or to laws licensing drivers of such vehicles.) *State v. Vigneaux*, 130 La. 424, 58 South. 135. The most that can be said of it in this connection is that such a provision is merely a condition attached, as between the fed-

eral government and the state, to the contribution of aid provided by federal legislation, and cannot deprive the state of its power and duty as trustee of the public highways for the benefit of the people of the state, to enact reasonable regulations in the exercise of its police power over such highways."

We maintain that the "toll" provisions of the Federal Aid Act and the Federal Highway Act in no way conflict with the legislation of the State of Washington complained of by the appellant.

Respectfully submitted,

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Commission and Other Amici Curiae.*

# SUPREME COURT OF THE UNITED STATES.

No. 345.—OCTOBER TERM, 1924.

A. J. Buck, Appellant,	}	Appeal from the District Court of the United States for the Western District of Washington.
vs.		
E. V. Kuykendall, Director of Public Works of the State of Washington.		

[March 2, 1925.]

Mr. Justice BRANDEIS delivered the opinion of the Court.

This is an appeal, under § 238 of the Judicial Code, from a final decree of the federal court for western Washington dismissing a bill brought to enjoin the enforcement of § 4 of chapter 111 of the Laws of Washington, 1921. That section prohibits common carriers for hire from using the highways by auto vehicles between fixed termini or over regular routes, without having first obtained from the Director of Public Works a certificate declaring that public convenience and necessity require such operation. The highest court of the State has construed the section as applying to common carriers engaged exclusively in interstate commerce. *Northern Pacific Ry. Co. v. Schoenfeldt*, 123 Wash. 579; *Schmidt v. Department of Public Works*, 123 Wash. 705. The main question for decision is whether the statute so construed and applied is consistent with the Federal Constitution and the legislation of Congress.

Buck, a citizen of Washington, wished to operate an auto stage line over the Pacific Highway between Seattle, Washington and Portland, Oregon, as a common carrier for hire exclusively for through interstate passengers and express. He obtained from Oregon the license prescribed by its laws. Having complied with the laws of Washington relating to motor vehicles, their owners and drivers (*Carlsen v. Cooney*, 123 Wash. 441), and alleging willingness to comply with all applicable regulations concerning common carriers, Buck applied there for the prescribed certificate of public convenience and necessity. It was refused. The

ground of refusal was that, under the laws of the State, the certificate may not be granted for any territory which is already being adequately served by the holder of a certificate; and that, in addition to frequent steam railroad service, adequate transportation facilities between Seattle and Portland were already being provided by means of four connecting auto stage lines, all of which held such certificates from the State of Washington.<sup>1</sup> *Re Buck*, P. U. R. 1923 E, 737. To enjoin interference by its officials with the operation of the projected line, Buck brought this suit against Kuykendall, the Director of Public Works. The case was first heard, under § 266 of the Judicial Code, before three judges, on an application for a preliminary injunction. They denied the application. 295 Fed. 197. A further application for the injunction made after amending the bill was likewise denied. 295 Fed. 203. Then the case was heard by the District Judge upon a motion to dismiss the amended bill. The final decree dismissing the bill was entered without further opinion. See also *Interstate Motor Transit Co. v. Kuykendall*, 284 Fed. 882.

That part of the Pacific Highway which lies within the State of Washington was built by it with federal aid pursuant to the Act of July 11, 1916, c. 241, 39 Stat. 355, as amended February 28, 1919, c. 69, 40 Stat. 1189, 1200, and the Federal Highway Act, November 9, 1921, c. 119, 42 Stat. 212. Plaintiff claimed that the action taken by the Washington officials, and threatened, violates rights conferred by these federal acts and guaranteed both by the Fourteenth Amendment and the Commerce Clause. In support of the decree dismissing the bill this argument is made. The right to travel interstate by auto vehicle upon the public highways may be a privilege or immunity of citizens of the United States. Compare *Crandall v. Nevada*, 6 Wall. 35. A citizen may have, under the Fourteenth Amendment, the right to travel and transport his property upon them by auto vehicle. But he has no right to make the highways his place of business by using them as a common carrier for hire. Such use is a privilege which may be granted or withheld

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<sup>1</sup>An additional ground for refusing the certificate was that the applicant did not appear to have financial ability. This ground of rejection does not require separate consideration; among other reasons, because the plaintiff later asserted, in his bill, that he possessed the requisite financial ability, and the motion to dismiss admitted the allegation.

by the State in its discretion, without violating either the due process clause or the equal protection clause. *Packard v. Banton*, 264 U. S. 140, 144. The highways belong to the State. It may make provision appropriate for securing the safety and convenience of the public in the use of them. *Kane v. New Jersey*, 242 U. S. 160. It may impose fees with a view both to raising funds to defray the cost of supervision and maintenance and to obtaining compensation for the use of the road facilities provided. *Hendrick v. Maryland*, 235 U. S. 610. See also *Pierce Oil Corporation v. Hopkins*, 264 U. S. 137. With the increase in number and size of the vehicles used upon a highway, both the danger and the wear and tear grow. To exclude unnecessary vehicles—particularly the large ones commonly used by carriers for hire—promotes both safety and economy. State regulation of that character is valid even as applied to interstate commerce, in the absence of legislation by Congress which deals specifically with the subject. *Vandalia R. R. Co. v. Public Service Commission*, 242 U. S. 255; *Missouri Pacific Ry. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612. Neither the recent federal highway acts, nor the earlier post road acts, Rev. Stat., § 3964; Act of March 1, 1884, c. 9, 23 Stat. 3, do that. The state statute is not objectionable because it is designed primarily to promote good service by excluding unnecessary competing carriers. That purpose also is within the State's police power.

The argument is not sound. It may be assumed that § 4 of the state statute is consistent with the Fourteenth Amendment; and also, that appropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the Commerce Clause, where the indirect burden imposed upon interstate commerce is not unreasonable. Compare *Michigan Public Utilities Commission v. Duke*, No. 283, decided January 12, 1925. The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort, through state officials, to a



test which is peculiarly within the province of federal action—the existence of adequate facilities for conducting interstate commerce. The vice of the legislation is dramatically exposed by the fact that the State of Oregon had issued its certificate which, despite existing facilities, ~~declared that~~ public convenience and necessity required the establishment by Buck of the auto stage line between Seattle and Portland. Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is no merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause. It also defeats the purpose of Congress expressed in the legislation giving federal aid for the construction of interstate highways.

By motion to dismiss filed in this Court, the State makes the further contention that Buck is estopped from seeking relief against the provisions of § 4. The argument is this: Buck's claim is not that the Department's action is unconstitutional because arbitrary or unreasonable. It is that § 4 is unconstitutional because use of the highways for interstate commerce is denied unless the prescribed certificate shall have been secured. Buck applied for a certificate. Thus he invoked the exercise of the power which he now assails. One who invokes the provisions of a law may not thereafter question its constitutionality. The argument is unsound. It is true that one cannot in the same proceeding both assail a statute and rely upon it. *Hurley v. Commissioner of Fisheries*, 257 U. S. 223, 225. Compare *Wall v. Parrot Silver & Copper Co.*, 244 U. S. 407, 411. Nor can one who avails himself of the benefits conferred by a statute deny its validity. *Pierce Oil Co. v. Phoenix Refining Co.*, 259 U. S. 125; *St. Louis Co. v. Prendergast Co.*, 260 U. S. 469, 472. But in the case at bar, Buck does not rely upon any provision of the statute assailed; and he has received no benefit under it. He was willing, if permitted to use the highways, to comply with all laws relating to common carriers. But the permission sought was denied. The case presents no element of estoppel. Compare *Arizona v. Copper Queen Mining Co.*, 233 U. S. 87, 94 *et seq.*

*Reversed.*

may be deemed equivalent to a legislative declaration that